

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ELIZABETH GOODWIN, As : Case No. 1:15-cv-00210
Administrator of the Estate : Cleveland, Ohio
of BRIAN GARBER, :
Plaintiff, : Tuesday, February 19, 2019
: 1:06 p.m.
v. :
VOLUME 1 - JURY TRIAL
(Pages 92 - 257)
RICHLAND COUNTY, OHIO, et :
al., :
Defendants. :

TRANSCRIPT OF JURY TRIAL PROCEEDINGS

BEFORE THE HONORABLE WILLIAM H. BAUGHMAN, JR.

UNITED STATES MAGISTRATE JUDGE

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Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription.

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ALSO PRESENT: Deputy Raymond Jeffrey Frazier
Deputy Andrew Knee
Deputy James Nicholson

24

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1 AFTERNOON SESSION, TUESDAY, FEBRUARY 19, 2019

2 AFTERNOON SESSION

3 DEPUTY CLERK: All rise.

4 - - -

13:06:39 5 (Proceedings reconvened at 1:08 p.m.)

6 (In Open Court - Jury Not Present)

7 (Defendant Present)

8 - - -

9 THE COURT: All right. Before we bring in the
13:08:17 10 jury, there is a matter of a demonstrative exhibit.

11 Where do we stand on that?

12 MR. DOWNEY: Your Honor, I think counsel spoke
13 after the Court left, and what was represented to myself and
14 Ms. Williamson is acceptable. As long as they cut off where
13:08:36 15 they suggested that they would, we're agreeable for using
16 it.

17 THE COURT: All right.

18 Ms. Greene, is everybody on the same page?

19 MS. GREENE: Yes, Judge. We plan to use only
13:08:47 20 limited parts for the opening, and we discussed all those
21 parts.

22 THE COURT: Very good. All right.

23 MR. DOWNEY: If I may, Your Honor, just
24 briefly.

13:08:52 25 THE COURT: Yes, you may.

1 MR. DOWNEY: And I hate to trouble the Court
2 with preliminary matters, but I know we're going to probably
3 get into witnesses this afternoon.

4 THE COURT: Yes.

13:08:57 5 MR. DOWNEY: One of them will, I think, be
6 Deputy Frazier, based on representations by counsel.

7 And I wanted to address one issue regarding the
8 preliminary rulings by the Court, and how they might impact
9 cross-examination.

13:09:08 10 Ms. Williamson and I reviewed the Court's orders, and
11 we read the Court's orders to really limit the relevance of
12 any officer that came and investigated the scene after the
13 fact.

14 And we've read the Court's order to mean that the BCI
13:09:22 15 report does not come into evidence, and we read the Court's
16 decision to mean that that would really negate the relevance
17 of Cory Momchilov testifying in this case as the lead agent
18 for BCI.

19 When we consider Deputy Frazier, who is going to be on
13:09:38 20 the stand today, he has given a number of statements, Your
21 Honor, during the course of the investigation after the
22 fact.

23 So we know that those statements are proper for use as
24 impeachment, if it were to arise that way. And from the
13:09:49 25 defense perspective, we think the appropriate way to handle

1 that would be to indicate that he had given a statement, but
2 not specifically the statement that was a part of
3 investigation or it was to a BCI agent or something of that
4 nature.

13:09:59 5 And we had planned to proceed like that with, for
6 instance, Matt Garber, who also gave a statement to BCI
7 through the course of their investigation.

8 But after speaking to Mr. Gilbert, we just had some
9 concerns from the defense side, and wanted a brief
13:10:10 10 clarification from the Court as to whether or not
11 Cory Momchilov is even, you know, able to bring relevant
12 testimony in light of the ruling that he can't bring in
13 anything about his conclusions.

14 And we wanted to understand if he's actually available
13:10:25 15 to testify about other things that he did in carrying out
16 the investigation, because, I think, Mr. Gilbert intends to
17 call him for such matters; and we think that would be
18 prejudicial under 106, to the defense, to suggest that he
19 conducted an investigation, but to not relay the results of
13:10:41 20 it.

21 THE COURT: Mr. Gilbert.

22 MR. GILBERT: Well, he is relevant because he
23 is the lead agent in the Bureau of Criminal Investigation.
24 He is going to explain how BCI was called in to do the
13:10:58 25 investigation, how they collected evidence, how they dealt

1 with the crime scene, who was there.

2 He's going to talk about his report. He's not going
3 to ask -- I'm not going to ask him about anything regarding
4 any opinions as to the ultimate issue of fact, that he did
13:11:24 5 the investigation. There were things that he did. There
6 were forensic things that were done.

7 All of it's in the report. None of it is
8 controversial. To give the jury an understanding of how
9 this investigation led, you know, to where we're at.

13:11:42 10 So I don't -- I mean, my understanding of your order
11 was that the findings of the BCI report would not be
12 admitted.

13 THE COURT: Well, certainly, they will not be
14 admitted.

13:11:57 15 Now, this idea that there was an investigation, and
16 then to leave it at that, is that going to cause some
17 confusion, speculation on the part of the jury?

18 They investigated it. To what end?

19 And why don't we have some information as to what the
13:12:13 20 conclusions were?

21 MR. GILBERT: I'm sorry. I don't understand.

22 THE COURT: All right. Well, perhaps I wasn't
23 clear.

24 You have all this testimony about an investigation.

13:12:23 25 You have no testimony, or the conclusions themselves are not

1 put into evidence.

2 Doesn't that leave the jury hanging as to why was this
3 done?

4 There's an investigation, and so what?

13:12:43 5 MR. GILBERT: Well, there's an investigation
6 where evidence was collected, evidence was tested. The
7 period of time in which the crime scene was under control,
8 the deputies that were there -- or some of the deputies that
9 were there, we have questions about the remote that they
13:13:11 10 took from the crime scene that no other people from the
11 sheriff's department saw.

12 There is a report on DNA evidence. There's some
13 fingerprint stuff that's not in controversy. And
14 they -- they conducted interviews, which will be used --
13:13:31 15 some of which might be used in impeachment.

16 THE COURT: For impeachment?

17 Well, certainly, they'd be relevant for impeachment.

18 Is there some way you can talk about what he did at
19 the crime scene without indicating that there ended up being
13:13:47 20 a formal report and a finding?

21 MR. GILBERT: I mean --

22 THE COURT: Let's let him finish.

23 MR. GILBERT: We're not asking for any
24 conclusions. Okay?

13:13:58 25 We want to know -- we want the jury to understand that

1 there's an investigation here. That there were certain
2 protocols that were followed. That -- what they did in this
3 investigation. So -- because then they understand how this
4 evidence gets into trial.

13:14:15 5 I'm not willing to stipulate to any of that. I think
6 he was on the scene. He made some certain investigative
7 decisions as to who to talk to, where -- what evidence to
8 collect, and ordered certain testing to be done of certain
9 evidence.

13:14:40 10 I mean, I don't know what else we can do.

11 Every case that I've had as a criminal case, a
12 detective has taken the stand and gone over the
13 investigation.

14 We also believe that there was some contamination of
13:14:56 15 the crime scene.

16 So these are all relevant for the jury to determine
17 the facts in this case, and whether it was a -- it was --
18 what the investigation revealed.

19 Ms. Greene wants to --

13:15:09 20 MS. GREENE: And, Judge, I'd just add that
21 when we filed our motions in limine, specifically what we
22 were seeking to exclude was conclusions of any
23 investigations. BCI doesn't make findings on justifiable
24 shootings.

13:15:21 25 But in addition to that, what we moved to exclude was

1 that the reports themselves would not come in, but not
2 necessarily that factual issues processed through the
3 investigation could not be discussed.

4 THE COURT: Mr. Downey.

13:15:36 5 MR. DOWNEY: If I may, Your Honor.

6 And, again, the Court's point about how to use the
7 interviews for impeachment is a good one, and that's why in
8 the past, when this has arisen, I think that you can use it
9 as a statement from the witness that was given in the past
13:15:51 10 without necessarily disclosing who it was given to or when.

11 You know, from the defense perspective, grand jury, as
12 an example, you know, we can't -- we can't tell the jury the
13 grand jury no billed these officers, but then saying, Hey,
14 here's your grand jury statement, using it for impeachment,
13:16:08 15 I don't think would be proper, unless you told them that
16 there was no bill.

17 THE COURT: Right. I would agree that there
18 should be no reference to the fact that there was a grand
19 jury inquiry, and that it can be handled. You gave a
20 statement at a certain time, and not indicate that it was
21 during a grand jury.

22 MR. DOWNEY: So I would extrapolate,
23 Your Honor, if I may, and continue with respect to the BCI
24 agent.

13:16:32 25 The Court has quite properly, I think, addressed this

1 case as what occurred in the room --

2 THE COURT: Right.

3 MR. DOWNEY: -- in the 45 seconds to a minute.

4 The three officers are all available to testify. They will
13:16:42 5 testify. The evidence has been gathered with respect to
6 what happened. There are multiple statements from each of
7 the officers that could be cross-examined.

8 Mr. Momchilov came after the fact. Conducted an
9 investigation, the results of which are not being provided
13:16:56 10 to the jury. That would necessarily be prejudicial to these
11 three officers, and, frankly, would not drive the case
12 forward in any way.

13 So, in a way, it would be bringing in, you know,
14 opinions as to what the officer chose to do in the
13:17:08 15 investigation. That doesn't affect what Deputy Frazier did
16 at the time of shooting.

17 And from our perspective, when we read the order from
18 the Court, we thought it was clear that none of this would
19 come in. And, frankly, we agree with the Court's ruling on
13:17:23 20 that issue. We think that either none of it should come in,
21 or all of it should come in.

22 THE COURT: Well, the fact that the remote was
23 tested, there were no fingerprints, there was no DNA, I
24 think that's certainly probative here.

13:17:38 25 MR. DOWNEY: And certainly, they could bring

1 that up. You know, we could do that through a stipulation.
2 But also what I'd say to the Court is that Matt Garber
3 observed Brian Garber with something underneath his shirt in
4 the room where the shooting occurred shortly before that,
13:17:51 5 which establishes that he had some object underneath his
6 shirt that looked like a gun. Whether it was a remote or
7 something else, there was some object underneath his shirt.

8 So the idea that because there was no DNA or
9 fingerprints on the remote, that's not really probative of a
13:18:04 10 major issue of the case. All the testimony is that this
11 gentleman, Brian Garber, had something under his shirt.

12 So I think it's confusing to the jury to suggest that
13 somehow suggests he didn't have anything under his shirt,
14 when his own father testified that he did that very night.

13:18:18 15 THE COURT: Well, again, these are contested
16 issues of fact. I think the fact that there was -- no DNA
17 was found on it, that there were no fingerprints found on
18 it, that's probative, and that can be brought up.

19 And if this witness is the one who says that, I was
13:18:36 20 called to the scene; I did certain things; I collected this;
21 certain tests were run; here's what we found, that seems to
22 be fine. But there's a very fine line here.

23 MR. GILBERT: Yeah. Well --

24 THE COURT: Very fine line getting into this
13:18:52 25 idea that there was some formal investigation. Using those

1 terms, "formal investigation," if someone comes on the scene
2 and is asked to gather some evidence, then -- and they do
3 that and they test the evidence and there are certain
4 findings with respect to that evidence -- fact findings with
13:19:11 5 respect to that evidence, that seems -- I don't know what
6 your ultimate theory is going to be with respect to that
7 remote.

8 But it appears that you're going to argue that because
9 there was no DNA, and because there's no fingerprints,
13:19:22 10 there's some questions there.

11 MR. GILBERT: And also, they were very
12 concerned about the so-called pop sound that justified the
13 shooting for all three of them. And they did some testing
14 on the cell phone to see if it had an app that made a loud
13:19:46 15 sound.

16 THE COURT: Well, there was --

17 MR. GILBERT: And they could not find
18 anything -- they could not finding anything that even came
19 close to a gunshot sound that could have produced this
13:19:58 20 so-called pop.

21 THE COURT: Is this the --

22 MR. GILBERT: This is the essential theme of
23 our case.

24 THE COURT: Is this the same witness?

13:20:04 25 MR. GILBERT: Yes.

1 THE COURT: All right. This is the first I'm
2 hearing about the cell phone.

3 MR. DOWNEY: Your Honor, from the defense
4 standpoint, it would be prejudicial to have Cory Momchilov
5 come in and testify whether he could recreate a pop sound
6 when the officers all testified that they heard one. It
7 could be literally anything that causes the sound.

8 I direct the Court to the oral argument in the Sixth
9 Circuit, where Judge Steger noted that in the argument
10 section. It could be anything.

11 So the idea that, Hey, Cory Momchilov wasn't able to
12 determine whether there was a pop sound in the room, that's
13 irrelevant. All the officers heard it. And, frankly, it
14 could of been any sort of sound like that.

13:20:40 15 MR. GILBERT: Well, it's obvious --

16 THE COURT: Whoa. Whoa. Whoa. One at a
17 time.

18 All right.

19 MR. GILBERT: That's his argument in the case.
20 His argument in the case has no bearing. We got to get the
21 facts out to the jury.

22 THE COURT: All right.

23 MR. GILBERT: This was an investigator that
24 saw the issue of a "pop" a critical part of this case.

13:20:57 25 THE COURT: All right. Mr. Gilbert, here's

1 what I'm going to come down, and here's a fine line here.

2 This witness came in, gathered certain evidence, made
3 certain tests. There's findings from those tests. Those
4 can come in.

13:21:12 5 I don't want any references to any formal
6 investigation to suggest in any way that there's a report
7 out there that this jury isn't going to see. But if there
8 are other tests that were run and observations made at the
9 scene when he came in, then he can testify on that.

13:21:27 10 But this is very, very, limited. So don't get into
11 the gray areas here.

12 MR. GILBERT: We'll confine it to that --
13 those areas.

14 THE COURT: All right.

13:21:36 15 MR. GILBERT: Thank you.

16 THE COURT: And as far as you -- yes. He
17 could stipulate to that, but it's up to him how he tries his
18 case.

19 MR. DOWNEY: I agree with that, Your Honor,
13:21:47 20 ultimately. Although, I think a stipulation would benefit
21 the jury and the Court because it would reduce the
22 opportunity for prejudices to the defense.

23 THE COURT: Well, that -- you're right about
24 that. And we'll see how close Mr. Gilbert or Ms. Greene
13:22:03 25 comes to that line.

1 I don't want to -- I don't want to see that line
2 transgressed. And if we're getting to the point where
3 there's any suggestion that there's a formal investigation
4 or a report, then that will not be admitted, and we'll
13:22:18 5 back -- and we'll back off from that.

6 Understood?

7 MR. DOWNEY: And if I may, Your Honor, just
8 briefly.

9 From the defense perspective, if we feel a door has
13:22:28 10 been opened to that, you know, I think it would be,
11 obviously, our client's interest to pursue that line of
12 inquiry further regarding findings --

13 THE COURT: Well, if it's merely --

14 MR. DOWNEY: -- if they open the door.

13:22:37 15 THE COURT: You can -- you can -- yes. You
16 can talk about the findings, but not get into the fact that
17 there was a formal investigation or that there was a report.
18 Certainly, if you open the door to findings, then you can
19 question the findings and their accuracy, and whether or not
20 the inferences that Mr. Gilbert is saying can be drawn from
21 those findings are reasonable inferences or not.

22 But we're going to stay away from formal
23 investigation, and we're going to stay away from any
24 reference to a report.

13:23:09 25 MR. DOWNEY: Thank you, Your Honor.

1 THE COURT: That's my ruling.

2 All right. Are we ready to have the jury brought
3 back? Any other matters?

4 MR. GILBERT: Are you sure?

13:23:21 5 MR. DOWNEY: No other matters, Your Honor.

6 Thank you.

7 THE COURT: All right. You're playing nicely.

8 MR. GILBERT: We also play nicely.

9 THE COURT: Please continue to do so. All
13:23:33 10 right.

11 Mr. DeVan, bring in the jury. And I will give them
12 some preliminary instructions, and then you'll each
13 have . . .

14 DEPUTY CLERK: All rise.

13:25:06 15 MR. GILBERT: One more.

16 Remember, when we talked about the cause of death, was
17 the result of the three deputies --

18 THE COURT: Right. Well, I think --

19 MR. GILBERT: -- firing.

13:25:19 20 THE COURT: I think for purposes of where
21 we're at now, there's still no issue as to proximate cause.

22 MR. GILBERT: Are we still at the same place?

23 MR. DOWNEY: Yes.

24 THE COURT: Yes.

13:25:27 25 MR. GILBERT: Since we dismissed the other

1 two.

2 THE COURT: Right.

3 MR. DOWNEY: Right.

4 THE COURT: We're all good.

13:25:33 5 DEPUTY CLERK: All rise for the jury.

6 (The jury entered the courtroom.)

7 DEPUTY CLERK: Please be seated.

8 THE COURT: Members of the jury, you have now
9 been sworn, and I will give you some preliminary
13:26:16 10 instructions to guide your participation in the trial.

11 It will be your duty to find the facts from the
12 evidence. You and you alone are the judges of the facts.
13 You will then have to apply those facts to the law as I will
14 give it to you. You must follow that law, whether you agree
13:26:37 15 with it or not.

16 Nothing the Court may say or do during the course of
17 the trial is intended to indicate what your verdict should
18 be.

19 The evidence from which you will find the facts will
13:26:50 20 consist of the testimony of witnesses, documents received as
21 exhibits, any facts that the lawyers agree or stipulate to,
22 and any facts that the Court may instruct you to find.

23 Certain things are not evidence and must not be
24 considered as such by you.

13:27:08 25 These are: One, the statements, arguments, and

1 questions by the lawyers are not evidence.

2 Two, objections to questions are not evidence.

3 Lawyers have an obligation to their client to make an
4 objection when they believe evidence is being offered that's
13:27:28 5 improper under the rules of evidence. The objections serve
6 as a help to the Court.

7 As jurors, you should not hold objections against
8 either the plaintiff or the defendant, or feel that either
9 side is trying to keep something from you. And you should
13:27:44 10 not be influenced by the objection or by the Court's ruling
11 on it.

12 If the objection is sustained, ignore the question.

13 If it's overruled, treat the answer like any other. If you
14 are instructed that some item of evidence is received for a
13:27:59 15 limited purpose only, you must then follow that instruction.

16 Testimony that the Court has excluded or told you to
17 disregard is not evidence and must not be considered.

18 Anything that you have seen or heard outside the
19 courtroom is not evidence and must be disregarded.

20 You are to decide the case solely on the evidence
21 presented here in the courtroom.

22 There are two kinds of evidence, direct and
23 circumstantial. Direct evidence is direct proof of the
24 facts, such as the testimony of an eyewitness.

13:28:35 25 Circumstantial evidence is proof of facts from which

1 you may infer or conclude that other facts exist.

2 For an example, if a witness testified that he looked
3 out on a window overlooking Public Square and saw people
4 walking on the square with open umbrellas, you may infer
13:28:56 5 from that testimony that it was raining at the time.

6 I will give you further instructions on these, as well
7 as other matters, at the end of the case, but keep in mind
8 that you may consider both kinds of evidence.

9 It will be up to you to decide which witnesses to
13:29:10 10 believe, which witnesses not to believe, and how much any
11 witness's testimony to accept or reject. I will give you
12 some guidelines for determining credibility of witnesses at
13 the end of the case.

14 Now, this is a civil case. The plaintiff has the
13:29:26 15 burden of proving his case by what we called a preponderance
16 of the evidence. That means, the plaintiff has to produce
17 evidence which, considered in light of all the facts, leads
18 you to believe that what the plaintiff claims is more likely
19 true than not.

20 To put it differently, if you were to put plaintiff's
21 and defendants' evidence on opposite sides of the scale, the
22 plaintiff would have to make the scale tip somewhat to his
23 side. If the plaintiff fails to meet this burden, the
24 verdict must be for the defendant.

13:30:02 25 Those of you have sat on criminal cases, or you may

1 have seen in television programs about the burden of proof
2 being beyond a reasonable doubt, that requirement doesn't
3 apply in a civil case. You should, therefore, just put it
4 out of your mind.

13:30:16 5 Now, a few words about your conduct as jurors.

6 First, during the trial, you're not to discuss the
7 case with anyone or permit anyone to even attempt to discuss
8 it with you or in your presence.

9 As to anyone whom you may recognize as having some
13:30:35 10 connection with the case, such as attorneys, parties, or
11 witnesses, you should have no conversation whatever with
12 them while you are serving on the jury.

13 If you see these people in the hall, in the elevator,
14 on the street, just ignore them. They will understand that
13:30:50 15 you're not being impolite; you are merely obeying the
16 Court's instructions.

17 They have also been instructed not to speak to you.
18 So they are not being rude if they ignore you. They are
19 also under court order. So have no conversation whatsoever
13:31:09 20 with anyone connected with the case, and do not discuss this
21 case with anyone.

22 If anyone should talk to you about the case, bring it
23 to the Court's attention promptly.

24 Second, you must also avoid reading any newspaper
13:31:22 25 articles about this case, and you must also avoid listening

1 to or watching any radio or television coverage concerning
2 this case.

3 Third, do not try to do any research or make any
4 investigation about this case on your own. You are to
13:31:37 5 decide this case solely on the testimony and evidence
6 presented during trial without consideration of other
7 matters whatsoever.

8 There are two slight exceptions to what I've just
9 said.

10 First, you may, of course, tell your family and your
11 employer that you have been selected as a juror.

12 And second, you may tell them what the schedule will
13 be for the trial.

14 However, do not tell them anything more. Do not tell
15 them the name of the case, who the lawyers or witnesses are,
16 the nature of the claim, or anything about the case until
17 it's completely over.

18 If you are having any problem with your employer or
19 expect a problem, please advise the Court in writing. The
20 courtroom deputy can provide a paper and a pen for that
21 purpose.

22 I or someone from my staff will advise your employer
23 that you must appear as part of your civic duty, and it must
24 not be held against you in any way. A letter can also be
13:32:34 25 sent explaining this to the employer, if appropriate.

1 Also, if during the course of the trial you need a
2 recess for personal reasons, such as a bathroom break, just
3 raise your hand. Sometimes I get carried away, and I forget
4 to take breaks when they're scheduled.

13:32:51 5 During your service as jurors in this case, my staff,
6 Mr. DeVan, Mr. Kurdziel, and Ms. Kassel, will be your
7 guardian angels. They will do everything they can on behalf
8 of the Court to make your time here as comfortable and
9 pleasant as probable. Please feel free to go to them if you
13:33:13 10 have questions, special needs, or problems.

11 I expect that we will have a lunch break each day of
12 approximately 1 hour and 15 minutes. I will try to release
13 you for lunch between 12:00 and 12:30 each day. We will
14 take about a 15-minute recess during the middle of each
13:33:29 15 morning and the afternoon.

16 I expect, and we'll try, to start no later than
17 9:00 a.m., and finish the end of the day by no later than
18 5:00 p.m. And we anticipate that this trial may take the
19 rest of this week, and depending on circumstances, might
13:33:48 20 extend into Monday of next week.

21 If it becomes necessary to change the schedule as I've
22 just described for any reason, I will certainly let you know
23 as soon as possible. If changing the schedule might create
24 any sort of problem for you, please let a member of my staff
13:34:05 25 know about your situation, and we will do everything we can

1 to accommodate your needs as much as possible.

2 Finally, don't form any opinion until all the evidence
3 is in. Keep an open mind until you start your deliberations
4 at the end of the case.

13:34:20 5 If you would like to take notes during the trial, you
6 may do so. You will be given an envelope which contains a
7 notepad and pen after opening statements of counsel. Please
8 write your name on the front of the envelope, along with
9 your juror number. Notes must be taken only on the notepad
13:34:39 10 provided to you.

11 Each time I call a recess, you may place your pad and
12 pen in your envelope, and leave it in your chair in the jury
13 box. You must not take this envelope into the jury room
14 before you begin your deliberations at the close of the
13:34:53 15 evidence in this case.

16 Also, you must not take the envelope with notepad when
17 you when you leave at the end of the day.

18 If you decide to take notes, be careful not to get so
19 involved in writing things down that you miss seeing or
13:35:08 20 hearing the witness.

21 Any notes that you have taken, which would be -- which
22 you will be allowed to take with you to the jury room for
23 review during your deliberations, are only to be used as an
24 aid to your memory.

13:35:23 25 If your memory should later be different from your

1 notes, you should rely on your memory, not your notes. If
2 you decide not to take any notes, rely on your independent
3 memory of the testimony, which counts just as much as any
4 other juror's recollection or notes.

13:35:40 5 Even though the court reporter is making stenographic
6 notes of everything that's said in this trial, a typewritten
7 copy of the testimony of the witnesses will not be available
8 to you during your deliberations. Therefore, pay close
9 attention to the testimony presented to you.

13:35:54 10 On the other hand, any exhibit admitted into evidence
11 during the trial will be available to you for detailed
12 study, if you wish, during the deliberations.

13 So if an exhibit is received into evidence but is not
14 fully read or shown to you at the time, don't be concerned,
13:36:11 15 because you will get to see and study it later, during your
16 deliberations.

17 You should not hold delays during the course of the
18 trial against any party. I'll take the responsibility for
19 it. You can hold it against me.

13:36:26 20 When a case on trial does not proceed according to the
21 schedule, the delay may be caused by the Court's
22 administrative duties or an unanticipated emergency matter.

23 Also, when the trial is interrupted or delayed for any
24 of these reasons, you should not feel that your time is
13:36:43 25 being wasted.

1 During the trial, there will be times when I need to
2 confer with the lawyers out of your hearing. These
3 conferences, which are sometimes referred to as bench or
4 sidebar conferences, are a necessary part of any trial. I
13:36:59 5 will do my best to keep them to a minimum and as short as
6 possible.

7 I have spoken to you during jury selection about
8 restrictions on use of electronic devices, and I want to
9 amplify that as part of these instructions.

13:37:17 10 First, you must try -- you must not try to get
11 information from any source other than what you hear and see
12 in the courtroom.

13 This means that you may not speak to anyone, including
14 your family and friends, you must not use any printed or
13:37:32 15 electronic sources to get information about this case or the
16 issues involved. This includes the Internet, reference
17 books or dictionaries, newspapers, magazines, television,
18 radio, computers, iPhones, Smartphones, iPads, or any other
19 electronic device.

13:37:49 20 You may not do any personal investigation, including
21 visiting any place involved in this case, using Internet
22 maps or Google Earth, talking to any possible witnesses, or
23 creating your own demonstrations or reenactments of the
24 events that are the subject of this case.

13:38:08 25 Second, you must not communicate with anyone about the

1 case or your jury service, and you must not allow anyone to
2 communicate with you. In particular, you may not
3 communicate about the above case through e-mail, text
4 messages, tweets, blogs, chat rooms, comments or other
13:38:29 5 postings, Facebook, LinkedIn, or other websites.

6 This applies to communicating with your fellow jurors
7 until I give you the case for deliberation, and it applies
8 to communicating with everyone else, including your family
9 members, your employer, the people involved in the trial;
13:38:44 10 although, you may notify your family and your employer that
11 you have been seated as a juror in this case, as I
12 previously explained.

13 But if you are asked or approached in any way about
14 your jury service or anything about this case, you must
13:38:59 15 respond that you've been ordered not to discuss the matter,
16 and to report the contact to the Court.

17 You must not engage in any activity or be exposed to
18 any information that might unfairly affect the outcome of
19 this case.

20 Any juror who violates the restrictions as I've just
21 explained them to you jeopardizes the fairness of these
22 proceedings, and a mistrial could result that would require
23 the entire trial process to start over again. So you can
24 imagine a mistrial is a tremendous expense and inconvenience
13:39:37 25 to the parties, the Court, and the taxpayers.

1 Any jurors exposed to outside information, or if
2 there's any difficulty whatsoever in following these
3 instructions, please notify the Court immediately.

4 These restrictions must remain in effect throughout
13:39:51 5 the trial. Once the trial is over, you may resume your
6 normal activities. At that point, you will be free to read
7 and research anything you wish. You will be able to speak
8 or choose not to speak about the trial with anyone you wish.

9 You may write, post, or tweet about the case, if you
13:40:09 10 choose to do so. The only limitation is that you wait until
11 after the verdict, when you have been discharged from your
12 jury service.

13 The trial will now begin.

14 First, each side will make an opening statement.

13:40:29 15 An opening statement is neither evidence nor argument.
16 It's an outline of what the party intends to prove offered
17 to help you in following the evidence. It's a roadmap.

18 Next, the plaintiff will present its witnesses, and
19 the defendant may cross-examine them.

13:40:46 20 Then the defendant will present his witnesses, and the
21 plaintiff may cross-examine them.

22 After that, the attorneys will make their closing
23 arguments to summarize and interpret the evidence for you,
24 and the Court will give you the instructions as a matter of
13:41:02 25 law.

1 You will then retire to deliberate your verdict.

2 Mr. Gilbert, Ms. Greene, opening statement limited to
3 20 minutes.

4 Do you wish to have a five-minute notice?

13:41:19 5 MS. GREENE: Sure, Judge. Thank you.

6 Can you all hear me?

7 (No response.)

8 MS. GREENE: Good afternoon.

9 Defendant Raymond Jeffrey Frazier was formerly a
10 deputy sheriff for the Richland County Sheriff's Office.
11 He's sitting over here at this table.

12 On March 14th, 2016, he set in motion an aggressively
13 reckless cascade of events which ended in the unjustified
14 and illegal shooting death of an unarmed man named
15 Brian Garber, and afterward, Defendant Frazier and his
16 fellow officers on the scene tried to cover it up.

17 The evidence in this case will show that on that date,
18 Brian Garber was in the midst of a mental health crisis.
19 His family asked law enforcement for help, but instead of
20 getting the help that he needed, Brian ended up dead in his
21 childhood bedroom.

22 The evidence in this case will show that the shooting
23 violated one of the most basic rules a police officer is
24 supposed to follow: Shooting an unarmed person, and taking
13:43:31 25 that person's life without just cause and good reason.

1 If we all believe that a police officer's most sacred
2 duty is to protect life, then this officer betrayed that
3 duty by taking away a life unnecessarily.

4 This is why we are here today, ladies and gentleman.

13:43:47 5 My name is Jacqueline Greene. And together with my
6 cocounsel, Terry Gilbert and Chance Douglas, we represent
7 the Estate of Brian Garber. And this is Brian Garber
8 (indicating).

9 The evidence in this case will show that the shooting
10 violated Brian's most fundamental rights under the U.S.
11 Constitution, the right not to be killed through the use of
12 unjustified, deadly force.

13 In this trial, we ask you to hold Defendant Frazier
14 responsible for his wrongful acts. And in our wonderful
15 system in America, we do hold public officials accountable
16 for their wrongdoing. Killing someone is the most powerful
17 action a public official can undertake. And because of
18 that, it has to be taken very seriously, and only permitted
19 when the law allows.

13:44:36 20 We're here in this courtroom to seek justice and
21 accountability. This is the only opportunity for a jury of
22 citizens, like yourselves, to review this case and make a
23 judgment using common sense and reason to do what is right.

24 This jury, serving in the role of one of the most
13:44:54 25 fundamental institutions set up by our Constitution, has the

1 power and responsibility to make these findings.

2 So speaking of our Constitution, this case has been
3 brought under the part of the Constitution known as the Bill
4 of Rights, and in particular, the right to be free from
13:45:08 5 unreasonable searches and seizures. That includes the
6 right --

7 MR. DOWNEY: Objection, Your Honor.

8 THE COURT: Your objection?

9 MR. DOWNEY: Objection, Your Honor. This is
13:45:19 10 an instruction of law, which is the process of the Court,
11 not for opening statement.

12 THE COURT: All right.

13 Ms. Greene, just limit yourself to the nature of your
14 claim without getting into the law itself.

13:45:34 15 MS. GREENE: I'll move on.

16 This remedy is very different -- when you come in and
17 file a civil rights lawsuit like this, it's very different
18 than suing a trucking company or an insurance company or a
19 private citizen. This applies only to seeking vindication
13:45:47 20 for civil rights violations committed by Government actors.

21 The wrongful taking of a life by someone with
22 Government power, and especially a police officer, is one of
23 the most severe wrongs that can be committed by a person who
24 is vested with a badge, with a gun, with arrest authority,
13:46:02 25 and who was sworn to uphold the law.

1 Judge Baughman will later instruct you on the law and
2 principles you must apply when you deliberate in this case.

3 But I do want to say that we all know that suing the
4 police is hard. They're held in high regard in our culture.
13:46:17 5 We believe them. We seek their help. We trust them. We
6 believe we need them in our communities, and we believe that
7 they serve and protect us. But just like --

8 MR. DOWNEY: Objection, Your Honor.

9 THE COURT: Overruled.

13:46:28 10 MS. GREENE: Just like any other profession,
11 though, some police do actually do bad things. And these
12 very few officers are outside -- who are acting outside of
13 the rules, actually do put people in danger and cause harm.

14 We can't ignore police who don't follow the rules.
13:46:45 15 And when police are out of control and act recklessly, we
16 are all at risk. Police must follow the law. Police must
17 protect life. Police must back off when appropriate.
18 Police must use other available means before using deadly
19 force. And police cannot justify shooting someone who
13:47:04 20 doesn't actually pose an immediate threat of death or
21 serious physical harm.

22 This is not too much to ask of those who have such
23 power. It's good for everyone because it makes us all safe.
24 Unfortunately, these simple rules did not work for
13:47:18 25 Brian Garber.

1 Now, let me tell you the story, as we see it, and what
2 we believe the evidence in this trial will show. Of course,
3 there are two sides to every story, as in any case. But
4 even the officer's story in this case showed that
13:47:31 5 Defendant Frazier violated Brian Garber's constitutional
6 rights.

7 And so this is where the story begins:

8 On March 14th, 2016, Brian was not acting like
9 himself. He's acting out. You'll hear that Brian arrives
13:47:47 10 home from work at the house he shares with his wife,
11 Sara Knowlton.

12 At that house, he gets into a confrontation with Sara
13 and with his mother, Connie Garber, and it does get
14 physical.

13:47:56 15 And you should see on your screen now, an aerial view
16 of the house where this all started, which is the one down
17 in the right-hand corner, 3425 Mill Run Road. This is the
18 house where the story begins.

19 You will hear during this trial, that Brian's family
13:48:13 20 knows at this time that he is in a mental health crisis, and
21 they're scared and concerned. His mother and wife do call
22 911, and you will hear that they call because they want to
23 get help for him. They want him to be taken to a hospital.
24 They want him to be cared for as he experiences this mental
13:48:29 25 health breakdown.

1 Now, just across the street from 3425 Mill Run Road,
2 if we go back to the aerial view for just a moment, you will
3 see 3400 Mill Run Road. This is where Brian's parents live,
4 just across the street.

13:48:47 5 You will hear that from Brian's parents -- you'll hear
6 from Brian's parents that after this confrontation that he
7 has earlier in the evening, he goes to this home, his
8 parents' home, and to his childhood bedroom in that house.

9 And, if you could, show us the house.

13:49:02 10 Thank you.

11 So this is the house where the story takes place.

12 Now, if we could look at the upstairs floor of this
13 house.

14 Deputy movement.

13:49:09 15 MR. DOUGLAS: Yep.

16 MS. GREENE: So you will see here, that you
17 have an overlay of the upstairs. You can see the stairs
18 coming up. You can see a hallway and you see a bedroom and
19 a -- or a couple of bedrooms. The bedroom on the right-hand
20 side toward the bottom of your screen, this is Brian's
21 childhood bedroom.

22 So you'll hear that when Brian is in this bedroom, he
23 continues his bizarre behavior. His parents see him there,
24 where he has his hand under his shirt, and he implies that
13:49:44 25 he has a gun. You will hear that his mother assures that

1 this is odd behavior, and he doesn't actually have a gun.

2 In the meantime, he sends some unsettling text
3 messages to his wife, including one that does says that he
4 has a gun. She calls 911 to report his text messages. The
13:50:03 5 Richland County Sheriff's Office sends officers to the
6 scene.

7 You will also hear that Defendant Frazier, along with
8 Sergeant James Nicholson and Deputy Andrew Knee, respond to
9 the Garber home at 3400 Mill Run Road. You will hear that
13:50:15 10 the deputies go into the house, up the stairs, and down the
11 hallway.

12 And if you look on the screen, you will see that this
13 is the order they traveled in: First, Sergeant Nicholson,
14 then Deputy Knee, followed by Defendant Frazier. Nicholson
13:50:34 15 and Knee stay at the doorway, and Deputy Frazier entered the
16 bedroom.

17 And this moment in time, folks, this is the moment in
18 the story where you have to start listening very carefully.

19 You will hear testimony from these officers during the
20 trial, and throughout the trial, you must keep your eyes and
21 ears open for the things that do not add up in their
22 stories.

23 Pay close attention, please, to everything
24 Defendant Frazier says, along with the testimony of other
13:51:04 25 witnesses from the Richland County Sheriff's Office.

1 Please, also pay close attention to the physical
2 evidence, and take note when it contradicts the testimony of
3 the officers.

4 As the trial goes on, you will hear from these
5 officers that when they get to Brian's room, they say that
6 Brian says, I have a gun. They will also all say they
7 thought he had a gun under his shirt at that time.

8 Now, you'll also hear that none of them fire their
9 weapons at Brian in this moment. We believe the evidence
0 will show you that this is because there was no imminent
1 threat at the time.

12 Instead, you'll also hear their varying descriptions
13 about what they supposedly saw under his shirt, and you will
14 hear that Sergeant Nicholson begins having a conversation
15 with Brian to deescalate the situation. You'll hear that
16 this conversation goes on for approximately 45 seconds to a
17 minute.

18 (Pause in proceedings.)

19 MS. GREENE: Stop the clock.

13:53:12 20 This is the moment, after that 45 seconds to 1 minute,
21 when the story turns tragic. You'll also hear that this is
22 the moment when the story turns implausible.

23 You will hear from these officers that they hear a
24 loud "bang," which they are all sure was a gunshot, but
13:53:31 25 there was no bang coming from Brian Garber, because he was

1 unarmed. He did not have a gun.

2 The bang came from an officer's gun. The evidence
3 will show that this was a show directed at Brian, at the
4 unarmed man who was sitting on the bed in his childhood
13:53:46 5 bedroom.

6 You will hear that this shot came from the man sitting
7 over here, Deputy Raymond Frazier. This defendant shot and
8 fired his weapon at Brian Garber without justification, and
9 provoked the other two deputies in the room,
13:54:02 10 Sergeant Nicholson and Andrew Knee, in a contagious
11 reaction, to fire their own weapons as well. There were
12 16 shots fired; 14 of them hit Brian Garber.

13 And then a 10-month effort to come up with an
14 illogical explanation to escape accountability.

13:54:20 15 You will hear that they all fired on Brian Garber in
16 response to that "bang," Defendant Frazier's shot.

17 You will also hear that these officers admit they were
18 not justified in shooting before the bang. You will hear
19 that Defendant Frazier fired first, and you will hear that
20 his conduct led to the tragic cascade of events that
21 resulted in Brian's death.

22 All three of these officers will tell their story in
23 the courtroom, and you will hear each one of them tell you
24 what they saw in the room before, during, and after the
13:54:53 25 shooting. You'll also hear that Defendant Frazier has

1 offered more than one version of the story about what
2 happened here.

3 But who is speaking for Brian?

4 In this case, the crime scene tells his story.

13:55:05 5 Most critically, you will hear that Brian Garber was
6 unarmed when he was shot, and you will hear, therefore, that
7 he could not have fired a shot at the officers.

8 You'll also hear from the medical examiner, who will
9 tell you where Brian was shot, and tell you about his
13:55:21 10 injuries.

11 You'll see photographs of the room from right after
12 Brian was shot, and you'll see evidence that a remote
13 control, the kind any of your kids or siblings might have
14 had in the '90s for a toy car, this remote control is laying
13:55:33 15 on the bed.

16 You'll hear that none of the deputies saw this remote
17 during or before or after the shooting, but the evidence
18 will show that it somehow appeared in these photos of the
19 scene right after the shots.

20 You'll hear that this remote was assumed to have been
21 the object under Brian's shirt, since, after all, he
22 actually was not armed.

23 You'll hear from other law enforcement witnesses who
24 were present on the scene.

13:55:57 25 And when you take all of these circumstances, the

1 totality of the circumstances facing these officers, you
2 will see that their stories, and in particular,
3 Defendant Frazier's story, does not add up.

4 During this trial, you'll also hear from
13:56:14 5 Brian Garber's family and the administrator of his estate,
6 who will tell you all about Brian.

7 You'll hear that when he died, he was just 28 years
8 old. You'll hear that he had a 4-year-old and an
9 18-month-old at the time. You'll hear that he was a loving
13:56:28 10 father who lit up when he was with his children. You'll
11 hear that this was all taken from him, and taken from his
12 children for the rest of their lives, when he was shot by
13 these officers.

14 And you'll hear that he needed help, and that he never
13:56:41 15 got it.

16 The evidence in this case will show that Defendant
17 Jeff Frazier shot Brian unjustifiably and without cause, in
18 violation of the law. And the evidence will show that the
19 other two deputies, Knee and Nicholson, followed suit. And
13:56:58 20 the evidence will show that these events caused
21 Brian Garber's death.

22 Now, the anticipated defense will try to disparage the
23 character of Brian Garber, who cannot be here to defend
24 himself, of course, because he is deceased.

13:57:08 25 The defense will also try to challenge the character

1 of the family. They'll argue that this was a tough
2 situation and that police have a tough -- police have a
3 tough job. And we agree, it is a tough job.

4 But police must be required to follow the rules, and
13:57:23 5 to follow the law that protects all of us. These rules and
6 the law protect all of us, including those of us with mental
7 health issues.

8 We're going to ask you at the end of the case, to
9 assess the credibility of the witness and the evidence.

13:57:38 10 Under the law, every witness deserves the same
11 consideration. This is what the Judge will instruct you.

12 And in this case, you will hear that Deputy Frazier
13 has changed his story multiple times.

14 We all want to believe officers when they tell us that
13:57:53 15 what they did was right. We're not asking you to condemn
16 all police officers or policing, and most officers
17 absolutely do the best that they can.

18 But in this case, we're asking you to keep an open
19 mind, and we're asking you to treat all officers just like
13:58:08 20 you would any other witness.

21 THE COURT: Five minutes remaining.

22 MS. GREENE: Thank you.

23 And to make a determination later about whether you
24 determine these officers' accounts are credible.

13:58:19 25 We believe that the evidence in this case will show

1 you that this was an unreasonable shooting against an
2 unarmed father who was the midst of this mental health
3 crisis in his childhood bed, and that there was absolutely
4 no need to shoot Brian Garber on that day. We will do our
13:58:34 5 best to prove all of this to you throughout the trial.

6 I should note before we move further into the trial,
7 the concept of "beyond a reasonable doubt," like in a
8 criminal case, does not apply here, as the Judge instructed.

9 If at the end of the trial you believe that it is more
13:58:48 10 likely than not that our side is right about the case, just
11 tipping the scale 51 percent in our favor, that's enough to
12 find for the plaintiff, the estate of Brian Garber. That's
13 all you need to find.

14 Think about the scales. If you put a feather on one
13:59:03 15 side, that's enough for you to find for the plaintiff.

16 This concept of more likely than not is referred to in
17 the legal setting as a "preponderance of the evidence." So
18 if we refer to that, that's what we're talking about.

19 As you hear, you know that Brian Garber was an
13:59:20 20 imperfect man. He needed help. But you'll also hear he was
21 a loving father, and he did not deserve to die.

22 As I leave you with these thoughts, and as the trial
23 begins, I just want to thank you for your time and energy
24 serving as jurors on this case.

13:59:33 25 It's really important to Brian and his family. This

1 is the one chance they have to tell their story.

2 But beyond that, your work is important to everybody
3 in the room. You are fulfilling a public duty to make our
4 Constitution matter. This is the document that sets our
13:59:46 5 nation apart. The Constitution means nothing unless the
6 people of this country can enforce the rights that it gives
7 to us all.

8 Members of the jury, after you've heard all of the
9 evidence, we are confident that you will find
14:00:00 10 Defendant Frazier liable for the unreasonable and unlawful
11 shooting of Brian Garber.

12 Thank you.

13 THE COURT: Opening, the counsel for the
14 defendant. 20 minutes.

14:00:26 15 MR. DOWNEY: Thank you, Your Honor.

16 May it please the Court.

17 My name is Dan Downey, and I'm here on behalf of now
18 retired Deputy Frazier.

19 This case is about choices, ladies and gentlemen of
14:00:46 20 the jury. Brian Garber made a number of choices, and it was
21 on March 16th of 2014.

22 He made choices that set into a course of events that
23 ultimately led to his death. It's tragic. The choices that
24 he made affected his family, and they also affected
14:01:04 25 Deputy Frazier and the other deputies that you will hear

1 from through the course of this case. It's truly
2 unfortunate.

3 A call went out, a 911 call. In Richland County, they
4 take 911 calls very seriously. Call came in at 7:10 on
14:01:17 5 March 16th. It was Connie Garber calling. And Connie was
6 staying across the street with her daughter-in-law,
7 Sara Knowlton, her son, Brian Garber. And their two
8 children were also present in the house at this time, at the
9 time of the events, 1 and 4 years of age.

14:01:31 10 Connie Garber called to say that Brian Garber was
11 beating her. He had hit her. She said he was going nuts.
12 And he had also strangled Sara Knowlton. That's what led to
13 officers coming out to the house.

14 The first two on the scene, you'll hear from them,
14:01:48 15 Lieutenant Zehner and Deputy Knee. They came to the home,
16 and they do what they're trained to do.

17 We all know that officers have a dangerous,
18 difficult job. Part of what they do is, they take evidence.
19 They interview people. They observe a scene, and they make
14:02:03 20 decisions.

21 When they arrived at the scene, they interviewed
22 Connie Garber. They interviewed Sara Knowlton.
23 Lieutenant Zehner spent time with the kids while Deputy Knee
24 interviewed them.

14:02:14 25 Now, during the course of this, Brian Garber fled the

1 home. He fled at some point in time after the call started
2 to 911. So you can logically believe he knew that the
3 police were called to the home. He left.

4 Deputy Knee interviewed, and he learned, you know,
14:02:28 5 that Brian had been physically violent. He observed a mark,
6 which you'll see on Connie Garber, that shows an injury to
7 her.

8 And the officers had made the decision, Brian Garber
9 was going to be charged and arrested for domestic violence.
14:02:42 10 They don't need somebody to sign a form when they observe
11 physical injuries. So that decision had been made.

12 They also made the decision to locate him. They
13 thought it was a very serious situation. So it's not a big
14 force down there, but three officers also came to the scene
14:02:59 15 to search for him.

16 You'll hear from them, Deputy Berry,
17 Sergeant Nicholson, and Deputy Frazier. Deputy Frazier was
18 dispatched to looking for Brian Garber at bridges and other
19 locations nearby.

20 You saw the photograph of the scene. It's wooded.
21 The houses are apart of each other. You don't see a lot of
22 houses in the overhead photograph. It's kind of a rural
23 area. They looked for him. They couldn't find him.

24 The officers on the scene, they closed off the scene
14:03:25 25 after about 45 minutes, and they subjected Brian Garber to

1 an ATL. What this means is, there's an attempt to locate.
2 He's going to be arrested if anybody sees him.

3 And that's what happened. The officers left. They
4 returned to their duties, as they're required to do. And
14:03:39 5 then about, ah, 10, 15 minutes later, another call comes in
6 from 911.

7 And what happened in the interim? Connie Garber took
8 the two kids across the street, up the hill to the 3400 Mill
9 Run address, and she took them up there for safety. And
14:03:57 10 when she got there, her husband, Matt Garber, was there. He
11 told her, Brian is upstairs in his bedroom.

12 So the two of them went up to the bedroom, and
13 Matt Garber and Connie interacted with Brian.

14 Now, the evidence is that Brian had an object
14:04:12 15 underneath his shirt that looked like a gun. Matt Garber
16 believed it was a gun. And Connie Garber said to him, Are
17 you telling me you have a gun?

18 They left the room.

19 Matt Garber told Connie Garber, Call the police.

14:04:25 20 Connie Garber went across the street to Sara Knowlton,
21 said, Call the police.

22 Sara Knowlton did that. Second call to police.

23 In the interim, Sara Knowlton began receiving text
24 messages, like, I don't care if I go to jail. I'll get out,
14:04:41 25 and I'll kill you.

1

2 That's what he said to his wife that he had
3 just strangled. That's the situation that these deputies
4 ultimately encountered.

14:04:48 5 So the deputies come out, and they go to the original
6 location because that's where the first call was. They
7 found out, no, he's actually across the street, up the hill.

8 Again, Lieutenant Zehner and Deputy Knee were first on
9 the scene. They go up the hill.

14:05:01 10 Sergeant Nicholson has his own cruiser. He goes up
11 the hill.

12 Deputy Frazier has his own cruiser. He goes up the
13 hill. Deputy Frazier is the third one out of his vehicle.
14 Zehner, a lieutenant at the time, tells Sergeant Nicholson
15 You're the shift supervisor. You're in charge.

16 Tells Knee, Follow him in.

17 Sergeant Nicholson goes up to the house. He knocks on
18 the door.

19 Now, the testimony will be that none of these officers
14:05:23 20 were familiar with this house. You folks have seen the
21 floor plan. They didn't. They didn't have a floor plan or
22 anything like that.

1 the scene.

2 At this time, Lieutenant Zehner was directing
3 Deputy Berry to go around the back of the house to create a
4 perimeter.

14:05:44 5 Again, these are well-trained law enforcement
6 officers. They're attempting to maintain a perimeter, and
7 also going to interact. They do dangerous things every day.
8 It's part of their job. This was a dangerous situation.

9 Deputy Knee and Sergeant Nicholson, they led the way
14:05:57 10 up the staircase, Nicholson in the lead. They found out
11 that he was upstairs at the end of the hallway. They
12 wouldn't have known that but for the information that
13 Matt Garber shared.

14 When they went up the staircase, Deputy Frazier did
14:06:10 15 not have his gun out. The two officers in front of him did
16 when they get to the stop of the staircase. They turned.
17 They went down to the end of the hallway. While they're
18 doing this, officers from other jurisdictions also came to
19 the call.

14:06:20 20 And so we have two officers from the Lexington Police
21 Department who enter the house, and on the staircase as
22 well.

23 We have Deputy Zehner at the top of the staircase at
24 the time the officers are interacting. He's actually
14:06:30 25 protecting against anything coming up the staircase while

1 the officers interact with Brian Garber.

2 Now, at this time, what these deputies know about
3 Brian Garber is, he says he's got a gun. Okay. He's been
4 violent earlier that night. He fled from police.

14:06:46 5 They know these things. He threatened his wife, to
6 kill her. That's what these officers know.

7 So they go up to the room where Brian Garber is
8 located. And part of what you saw is accurate, part of it
9 is not. The evidence will show what really happened when
14:07:02 10 you hear from the officers.

11 Deputy Knee was to the left of the door case.

12 Sergeant Nicholson was to the right of the door. Okay? And
13 Deputy Frazier was behind the two of them.

14 Now, Deputy Frazier is an experienced law enforcement
14:07:13 15 officer. He's been on SWAT team for many, many years. He
16 is well trained.

17 Sergeant Nicholson has done two tours in Iraq, he was
18 a military police officer, achieved the rank of sergeant in
19 the military, and had also been a SWAT team officer.

14:07:28 20 Both Nicholson and Frazier were trained in how to
21 deescalate the situation. Both of them had the training.

22 When Frazier saw Knee standing partially in the
23 doorway, he went by him, brushed by him, and entered
24 approximately 3 feet into the room, which is basically the
14:07:44 25 width of the door.

1 He did that because he had not worked with Deputy Knee
2 in the past, and he was concerned about whether Deputy Knee
3 had the experience to interact in the way that it was
4 required. He was concerned for him. He saw him in the
14:07:57 5 doorway. So Frazier entered.

6 At the time that Frazier entered the room -- and he's
7 the only officer that entered the room at this point in
8 time. At the time he did that, Brian Garber's words, I have
9 a gun.

14:08:06 10 Now, you folks just saw a minute transpire. Think
11 about the minute that transpired for these officers.
12 They're standing there, and Frazier pulled his gun out as
13 soon as Garber says that. They're standing there with their
14 gun trained on Brian Garber.

14:08:21 15 And Brian Garber has an object under his shirt that he
16 has presented to these officers, back and forth to each of
17 them, looking them each in the eye -- eyes as big as saucers
18 is what Sergeant Nicholson will tell you -- for a minute.

19 I submit to you that these officers and Deputy Frazier
20 showed remarkable restraint in not shooting Brian Garber at
21 that point in time, when he entered the room. It's because
22 they're trained, and they're good officer.

23 Now, you're also going to hear that Deputy Frazier
24 gave commands to Brian Garber. Show me your hands. Drop
14:08:51 25 the gun. Things that Brian Garber disregarded. Choices

1 that he made. He made the choice not to comply with these
2 officers. He made those choices.

3 Sergeant Nicholson also gave commands.

4 So Deputy Frazier stopped talking to Brian Garber. He
14:09:04 5 stopped, but Sergeant Nicholson handled the deescalation.

6 And you're going to hear what Nicholson said from him,
7 from me, from Frazier. You're going to hear it from the
8 Lexington officers at the bottom of the stairs. He said
9 words to the affect of, We all have families. It doesn't
14:09:18 10 have to happen like this. We can get you help.

11 Brian Garber, No. You're going to have to shoot me.

12 The entire time, looking right at them in the eye,
13 moving that object under his shirt back and forth,
14 presenting as a gun and an armed threat, a threat to these
14:09:34 15 officers. To their lives. To their well-being. To each
16 other.

17 That, after a minute, is when the officers -- and they
18 will all tell you they heard a pop. There were various
19 things in that room. There's a beer can between
14:09:44 20 Brian Garber's leg. They heard a "pop," a "bang," words to
21 the effect.

22 When they heard that, these officers are trained to
23 end a threat, and they did. They fired for 1 to 2 seconds.
24 That's how long it took. Brian Garber was killed instantly.

14:09:58 25 And I submit to you he was killed because he made a

1 choice, not because of anything that these officers did. In
2 fact, these officers showed remarkable restraint. They
3 complied with the Constitution. They complied with the laws
4 of the State of Ohio.

14:10:10 5 They had a dangerous job. They did that job. And
6 it's a tragedy what happened to Brian Garber, but it was
7 justified, and it was proper under the laws of the State of
8 Ohio and the United States of America.

9 And each of these officers deserve and appreciate the
14:10:23 10 time you're going to put into this case listening to the
11 evidence.

12 We encourage you to listen to these officers. They
13 had a difficult job and did very good work. We encourage
14 you to listen to them.

14:10:34 15 And we submit to you in the close of this case, you're
16 going to find in their favor.

17 Thank you very much.

18 THE COURT: Mr. Gilbert, Ms. Greene, is your
19 first witness ready?

14:10:53 20 MS. GREENE: Yes, Judge.

21 THE COURT: All right.

22 I am going to ask the jury, because the witness is
23 going to be testifying from this side, to move --

24 DEPUTY CLERK: The witness will be --

14:11:04 25 THE COURT: Oh, right here.

1 DEPUTY CLERK: The witness is on this side
2 over here.

3 THE COURT: Okay. All right. I'm sorry. I'm
4 backwards.

14:11:09 5 All right. You're fine.

6 And could you close the inside door back there?

7 DEPUTY CLERK: Yes.

8 THE COURT: Plaintiffs, you may call your
9 first witness.

14:12:33 10 MR. DOUGLAS: Plaintiffs call
11 Elizabeth Goodwin.

12 THE COURT: Ms. Goodwin, please come forward
13 and be sworn.

14 MR. DOUGLAS: Okay. We're going to get her.

15 DEPUTY CLERK: They got to get her.

16 THE COURT: All right.

17 DEPUTY CLERK: Stay standing, and raise your
18 right hand, please.

19 Do you solemnly swear or affirm that your testimony in
20 this case will be the truth, the whole truth, and nothing
21 but the truth, so help you God?

22 THE WITNESS: I do.

23 DIRECT EXAMINATION OF ELIZABETH GOODWIN
24 BY MR. DOUGLAS:

14:14:43 25 Q. Will you please state your name.

1 A. Elizabeth Goodwin.

2 Q. And what is your occupation, Ms. Goodwin?

3 A. I'm an attorney.

4 Q. How long have you been an attorney?

14:14:52 5 A. 24 years.

6 Q. And can you explain what your involvement is in this
7 case?

8 A. Currently, I'm the fiduciary of the estate of
9 Brian Garber.

10 Q. And is acting as a fiduciary part of your legal
11 practice?

12 A. Yes.

13 Q. And how many times throughout your career have you
14 acted in this capacity?

15 A. Hundreds.

16 Q. Okay. Prior to this case, have you been involved as
17 the administrator or fiduciary of an estate involving police
18 shootings?

19 A. Yes.

20 Q. How many times?

21 A. Three, not including this one.

22 Q. And please explain your role as administrator of the
23 estate of Brian Garber.

24 A. I will be -- if there's recovery, I would be
25 responsible for presenting the recovery amount to the

1 probate court judge in Richland County, Judge Mayer, and
2 asking him to determine the distribution of the proceeds.

3 Q. Okay. Can you explain quickly who are the beneficiary
4 of the estate of Brian Garber.

14:15:51 5 A. Well, his two children in the back, we have Holly and
6 Nicholas, and his wife. And he has a mother and father.

7 Q. Okay.

8 MR. DOUGLAS: I don't think I have anything
9 further.

14:16:07 10 MR. DOWNEY: No questions, Your Honor.

11 THE COURT: No questions.

12 Well, thank you. You may step down.

13 THE WITNESS: Thanks, Judge.

14 THE COURT: Plaintiff, call your next witness.

14:16:20 15 MR. GILBERT: We call Jeffrey Frazier.

16 THE COURT: Jeffrey Frazier?

17 MR. GILBERT: Yes.

18 THE COURT: All right.

19 MR. GILBERT: The defendant.

20 DEPUTY CLERK: Do you solemnly swear or affirm
21 that your testimony in this case will be the truth, the
22 whole truth, and nothing but the truth, so help you God?

23 THE WITNESS: Yes, I do.

24 DEPUTY CLERK: Thank you.

14:16:30 25 THE WITNESS: Thank you.

1 CROSS-EXAMINATION OF RAYMOND JEFFREY FRAZIER

2 BY MR. GILBERT:

3 Q. Good afternoon, Mr. Frazier.

4 A. Good afternoon.

14:16:59 5 THE COURT: Mr. Gilbert, we seem to be getting
6 some feedback off of that microphone. You may want to push
7 it out a little bit. All right.

8 BY MR. GILBERT:

9 Q. Would you please state your name for the record.

14:17:04 10 A. Retired Deputy Raymond Jeffrey Frazier.

11 Q. And when did you retire?

12 A. September 30th of last year.

13 Q. But you're no longer serving in the capacity of a
14 deputy sheriff?

14:17:23 15 A. No, sir, I'm not.

16 Q. How long were you a deputy officer with the
17 Richland County Police Department?

18 A. 17 years.

19 Q. How old are you?

14:17:36 20 A. I just turned 49 years old.

21 Q. Are you employed now?

22 A. I am not.

23 Q. Okay. When you were a sworn law enforcement officer,
24 do you believe that honesty is an extremely important part
14:17:59 25 of carrying out your duties as a police officer?

1 A. Yes, I do.

2 Q. Do you agree with me that telling any kind of false or
3 misleading statements can affect the integrity of the
4 investigation of any kind of police action?

14:18:16 5 A. Yes, I do.

6 Q. And if the honesty is not there, it could affect the
7 competence in an investigation of a serious matter, like a
8 shooting in the line of duty?

9 A. Yes. I agree with that, yes.

14:18:38 10 Q. And it also affects the respect of the rule of law
11 within the community that you serve; is that right?

12 A. That's right.

13 Q. And do you believe that justice can be undermined if
14 police do not tell the truth?

14:18:59 15 A. Yes.

16 Q. And do you believe it is important to tell the truth
17 when you are under oath, not just as a police officer, but
18 as a citizen as well?

19 A. Yes, I do.

14:19:11 20 Q. Now, you were involved in the shooting death of
21 Brian Garber, were you not?

22 A. I was, yes.

23 Q. On March 16th, 2014, correct?

24 A. Yes, that's correct, I was.

14:19:26 25 Q. And after that shooting, there was at least two

1 investigations of that matter?

2 A. At least --

3 MS. WILLIAMSON: Objection, Your Honor.

4 THE COURT: Overruled, just to the fact that

14:19:45 5 there were --

6 MR. GILBERT: Yeah.

7 BY MR. GILBERT:

8 Q. And one was by your own department, correct?

9 A. Correct.

10 Q. And the other was through the Ohio Bureau of Criminal
11 Investigation; is that right?

12 A. Correct.

13 Q. And you have given a number of statements in
14 connection with the events of March 16th, 2014; is that
15 right?

16 A. Yes, sir.

17 Q. Do you know how many times you made statements to
18 officials that were investigating this matter?

19 A. I don't know the exact number. Numerous.

20 Q. And some of these were on video?

21 A. Yes.

22 Q. Some of these were on audio?

23 A. Yes.

24 Q. Some of these were in proceedings where you were put
14:20:42 25 under oath, and there was a court reporter there, correct?

1 A. That's correct, yes.

2 Q. And I think you also gave a typewritten statement that
3 was submitted to the authorities; is that right?

4 A. That's correct, also.

14:20:57 5 Q. A statement that you prepared with the advice of an
6 attorney, correct?

7 A. Correct.

8 Q. So would you say that around four or five statements
9 were given?

14:21:10 10 A. I would agree with that, yes.

11 Q. Do you agree that taking a life of a person in the
12 line of duty is probably the most serious action that you
13 could take as a law enforcement officer?

14 Is that right?

14:21:28 15 A. It absolutely is the most serious thing you can do,
16 yes.

17 Q. And I'm sure you would agree with me that one of the
18 most sacred duties of a police officer is to protect life?

19 A. Correct.

14:21:49 20 Q. And when there is a situation with a police shooting,
21 you would expect that your statements would be subject to
22 scrutiny?

23 A. Certainly. Yes.

24 Q. And your account of what happened, along with the
14:22:13 25 input of your fellow officers, would be examined thoroughly

1 for accuracy, consistency, and truthfulness, right?

2 A. Of course. Yes.

3 Q. And as you sit here in front of this Court -- in this
4 courtroom, in front of this jury, can you say that you have
14:22:36 5 been fairly consistent regarding your account of the
6 shooting?

7 A. Yes.

8 Q. That you've been truthful about what happened?

9 A. Yes.

10 Q. And that there's been no contradictions or
11 inconsistencies?

12 A. I'm sure there's a couple of inconsistencies.

13 Q. Just a couple?

14 A. Mm-hmm. Yes.

15 Q. Okay. Well, we'll get into that in a minute.

16 A. Okay.

17 Q. All right. So let's talk about the shooting in this
18 case.

19 A. Okay.

20 Q. Or the events that led up to it.

21 You were on duty the -- on the day of March 14th --
22 March 16th, 2014?

23 A. Correct.

24 Q. And what time did you get on duty?

14:23:19 25 A. My shift started at 2:00 p.m. I worked the 2:00 p.m.

1 to 10:00 p.m. shift.

2 Q. All right. And did you have your own
3 department-issued cruiser, or vehicle?

4 A. Yes, sir. We had take-home cruisers. We have our own
14:23:38 5 cars.

6 Q. And was there a report relating to a physical
7 altercation, domestic violence incident, at 3425 Mill Run
8 Road?

9 A. Yes, there was.

10 Q. And how did you hear about that incident?

11 A. I heard a radio dispatch, and they dispatched two
12 officers to that scene.

13 Q. And what was your response to that information?

14 A. Initially, nothing.

15 Q. Did you -- were you dispatched to any particular area?

16 A. Not initially, no. I was at home eating when I heard
17 the call come out.

18 Q. All right. Did you engage in any efforts to locate
19 Brian Garber?

20 A. Yes. Later on, while they were at the call, they
21 advised that he had fled on foot. And at that time, then I
22 volunteered to go to the scene and assist in finding him.

23 Q. All right.

24 Can you maybe put the microphone --

14:24:49 25 A. I'm sorry.

1 Q. -- a little closer to you.

2 A. Yes, sir.

3 Q. Thank you.

4 A. How about if I just sit up? Would that work better?

14:24:59 5 Q. That's better.

6 A. All right.

7 Q. And you were aware that other deputies, and maybe even
8 other law enforcement officers, were also looking for
9 Brian Garber, correct?

14:25:08 10 A. The only persons looking for Brian Garber at that time
11 were myself, Sergeant Nicholson, and Deputy Berry.

12 Q. Were you aware that Nicholson and Knee
13 were -- responded to the location where the incident
14 occurred, at 3425 Mill Run Road?

14:25:30 15 A. It was Lieutenant Zehner and Deputy Knee that
16 responded to 3425. It's now Lieutenant Nicholson who was in
17 the area looking for Brian Garber.

18 Q. Now, everything that you knew before you responded to
19 the parents' home at 3400 Mill Run Road was from a radio
20 dispatch; is that right?

21 A. The radio dispatcher, and what I was relayed in person
22 by Sergeant Nicholson.

23 Q. When you got to the scene?

24 A. When I got to the scene, yes.

14:26:12 25 Q. All right. But while you were on the way there, what

1 you learned about the situation came from a dispatcher,
2 right?

3 A. It was straight from dispatch, yes.

4 Q. All right. You did not know Brian Garber before this
14:26:24 5 incident, did you?

6 A. Never. To the best of my knowledge, I'd never met
7 him.

8 Q. Did you understand that there was some erratic or
9 abnormal behavior in connection with Brian Garber's conduct
14:26:39 10 at the home?

11 A. At 3425 Mill Run Road?

12 Q. Yes.

13 A. The initial call? It just came in as a domestic
14 violence call, and that he'd kicked open the door and
14:26:51 15 assaulted his wife and his mother. I didn't receive any
16 other information after that, except when he fled from the
17 house.

18 Q. Okay. Okay. So then you -- you went to the residence
19 of his parents' house; is that correct?

20 A. Not while I was there the first time. I had left and
21 got dispatched back.

22 Q. All right. What did you do there the first time?

23 A. I never went to either one of the residence the first
24 time I was there. I searched the wooded area, under a
14:27:23 25 couple of bridges on Mill Run Road. Myself and

1 Sergeant Nicholson searched a couple of farmhouses, I think
2 a barn. And we talked to a neighbor who advised us that
3 Brian Garber lived in the area all his life, and if he
4 didn't want to be found, he wasn't going to be found.

14:27:40 5 Q. All right. Well, my question to you was, did you
6 arrive at -- did you go to the house?

7 A. No, I did not. I did not go -- I did go to the house.

8 Q. That's all I was asking you. Did you --

9 A. But not --

14:27:50 10 Q. Did you go to the house?

11 A. You asked me if I went to the house on the initial
12 call. I did not.

13 Q. All right. Well, let's get on track here.

14 A. Okay.

14:27:57 15 Q. At some point, you went to the house on 3400 Mill Run
16 Road; is that correct?

17 A. After we could not find Brian Garber on the initial
18 call.

19 Q. I didn't --

14:28:07 20 MR. GILBERT: Judge, would you have him answer
21 my questions, and not go through a narrative. Some of these
22 are yes or no questions.

23 THE WITNESS: Yes.

24 THE COURT: Repeat your question.

14:28:18 25 MR. GILBERT: Okay.

1 BY MR. GILBERT:

2 Q. Did you go to 30 -- at some point, go to 3400 Mill Run
3 Road?

4 A. Yes, I did.

14:28:23 5 Q. Okay. And if you don't understand my question, feel
6 free to ask me. I'll clarify.

7 A. I was under the understanding that you were lumping
8 them both together, and that wasn't the case.

9 MR. GILBERT: Judge --

14:28:34 10 THE COURT: Well, just proceed. Just be
11 clear.

12 MR. GILBERT: I mean --

13 THE WITNESS: I apologize.

14 THE COURT: One fact at a time per sentence.

14:28:40 15 MR. GILBERT: This is just a really basic
16 fact.

17 THE COURT: I know. So let's move through it.

18 MR. GILBERT: Okay.

19 BY MR. GILBERT:

14:28:46 20 Q. And I would appreciate, if you have a question, ask me
21 to clarify --

22 A. My apologies.

23 Q. -- if you don't understand the question. Okay?

24 A. Will do.

14:28:55 25 Q. Where did you know -- did you know where Brian Garber

1 was in that home at 3400 Mill Run Road?

2 Did you know where inside the house he was?

3 A. Not until we got into the house after

4 Sergeant Nicholson talked to his father.

14:29:16 5 Q. All right. So before you arrived, you didn't know
6 where he was in the house?

7 A. No, sir.

8 Q. Did you know who was in the house?

9 A. No, sir.

14:29:25 10 Q. Did you have a search warrant?

11 A. No, sir.

12 Q. Did you have an arrest warrant?

13 A. We had domestic violence charges.

14 Q. Okay. Did you have an arrest warrant?

14:29:35 15 A. A domestic violence warrant, a signed package, yes.

16 Q. Is that what you were told?

17 A. That's what I was told, yes.

18 Q. Okay.

19 MR. GILBERT: Can you put up Picture

14:29:52 20 Exhibit 29-5.

21 BY MR. GILBERT:

22 Q. Showing that exhibit, is this the house where you
23 arrived where you believed Brian Garber to be?

24 A. Yes.

14:30:09 25 Q. All right. And when -- and where that vehicle is, is

1 that the driveway facing the garage?

2 A. Yes.

3 Q. And when you arrived there, were there other police
4 vehicles there?

14:30:22 5 A. Yes.

6 Q. How many?

7 A. I believe two.

8 Q. There was a report that he might have a gun; is that
9 right?

14:30:37 10 A. That's correct.

11 Q. And this -- did anybody indicate to you anything more
12 about what the gun was or what it looked like or anything
13 like that?

14 A. No.

14:30:57 15 Q. So this is a -- a call that is -- has some high
16 capacity for danger, right?

17 A. Yes, that's correct.

18 Q. And it's important that you respond to a situation
19 like that safely and cautiously to protect yourself and any
20 other people that might be in that house?

21 A. Correct.

22 Q. When you arrived, did you meet anybody that lived in
23 the house?

24 A. The only person that we encountered when I went into
14:31:36 25 the house was Brian Garber's father.

1 Q. All right. You were the last one to arrive; is that
2 right?

3 A. That's correct, yes.

4 Q. Did any -- did the radio dispatch tell you to go
14:31:48 5 there, or you just went on your own?

6 A. I was told to go there by Lieutenant Zehner.

7 Q. Excuse me?

8 I'm sorry. What was your -- your last answer?

9 A. I was advised where he was at by Lieutenant Zehner.

10 Q. All right. And that meant to you to go to that scene?

11 A. They said on the hill. I asked what "on the hill"
12 meant, and they meant -- they said 3400 Mill Run Road.

13 Q. When you arrived there, did you actually meet the
14 other deputies in the driveway area?

14:32:37 15 A. They were already walking into the garage.

16 Q. All right. So did you announce yourself, that you
17 were there?

18 A. They seen me coming.

19 Q. And you were the last in line; is that correct?

20 A. That's correct.

21 Q. And when you went into the house, did you talk to
22 Mr. Garber, Matt Garber, the father?

23 A. No, I didn't.

24 Q. Did you ask him or anybody ask him any questions, Are
14:33:09 25 there anybody -- is there anybody else in this house?

1 A. I don't know what the conversation was between him and
2 Sergeant Nicholson. I didn't --

3 Q. Well, would it be important to know if there were
4 other people in the house with a man that's potentially
14:33:22 5 armed?

6 A. Yes.

7 Q. And did you hear anybody ask Mr. Garber, What's going
8 on upstairs? Are there any people upstairs? What can you
9 tell me about your son? Any information that might be
14:33:35 10 helpful?

11 A. I heard no conversation between Mr. Garber and anyone,
12 no.

13 Q. Isn't it important to get all the facts before you
14 walk into a dangerous situation and know exactly what you
14:33:52 15 might be facing?

16 A. Sure. Yes.

17 Q. The fact is, you didn't get any information from the
18 owner or occupant of the house that you met, correct?

19 A. I did not, no.

14:34:03 20 Q. Okay. But you didn't hear any information coming from
21 Mr. Garber either, did you?

22 A. No, sir, I didn't.

23 Q. And you didn't hear any questions being asked of him,
24 did you?

14:34:13 25 A. No, sir, I didn't.

1 Q. Okay. And did you -- did you see him motion
2 Mr. Garber upstairs?

3 A. I -- the -- Sergeant Nicholson said he was upstairs in
4 the last bedroom on the left.

14:34:27 5 Q. All right.

6 A. And that's where he was leading us to.

7 MR. GILBERT: Can you show Picture 29,
8 Exhibit 29-4.

9 BY MR. GILBERT:

10 Q. Can you, from your recollection, tell me if this looks
11 familiar to you?

12 A. Yes, it does.

13 Q. Okay. This looks like a picture of the hallway; is
14 that correct?

14:34:59 15 A. Correct.

16 Q. And at the -- in the picture is two stairs, correct?

17 A. Yes.

18 Q. And is that where Mr. Garber was pointing the
19 direction of where his son was?

20 A. He wasn't pointing at all.

21 Q. He was saying, He's upstairs, right?

22 A. I heard Sergeant Nicholson say he was upstairs.

23 Q. Okay.

24 A. But I'm guessing per the conversation he had with
14:35:30 25 Matt Garber.

1 Q. All right. So then you followed -- who was in front
2 of you?

3 A. Deputy Knee.

4 Q. And who was in front of Deputy Knee?

14:35:38 5 A. Sergeant Nicholson.

6 Q. So you were understanding that the room was up the
7 stairs, and then there was a landing --

8 A. Mm-hmm.

9 Q. -- and then you would go right down a hallway; is that
14:35:53 10 correct?

11 A. Yes.

12 Q. And at the end of the hallway, to the left, was the
13 bedroom where Brian Garber was; is that correct?

14 A. That's correct, yes.

14:36:29 15 MR. GILBERT: Can you bring up 27-9.

16 BY MR. GILBERT:

17 Q. So this is the end of the hallway, correct?

18 A. Yes, sir.

19 Q. And that opened doorway there, to the left of that
14:36:57 20 piece of furniture and some wall hangings, correct?

21 A. That's correct.

22 Excuse me.

23 Q. And approximately how much distance from the top of
24 the stairway down to the hallway would that be?

14:37:15 25 A. I -- I have no idea how far --

1 Q. It doesn't take much time to get up there, correct?

2 A. No. There's a couple of rooms between the stairs and
3 then that bedroom.

4 MR. GILBERT: You can take that down.

14:37:41 5 BY MR. GILBERT:

6 Q. And would you agree that the door was open?

7 It wasn't locked and closed?

8 A. It was open, yes.

9 Q. Did you -- when you were going down the hallway, did
10 you hear any kind of talking by Sergeant Nicholson?

11 A. No. He wasn't that far ahead of me to be -- have made
12 contact with Mr. Garber and engaged in any conversation yet.

13 Q. As you were walking down the hallway, did you hear
14 Brian Garber say anything?

14:38:16 15 A. No, I didn't.

16 Q. But when you walked down that hallway, you had your
17 weapon, right?

18 A. No.

19 Q. You didn't have a weapon with you?

20 A. Well, I had it with me. I didn't have it out.

21 Q. All right. You didn't have it out, right?

22 A. No.

23 Q. But the other two had their weapons out, correct?

24 A. That's correct.

25 Q. Did that indicate to you that there was a heightened

1 sense of danger?

2 A. Sure.

3 Q. Okay. But you didn't -- you didn't take your weapon
4 out.

14:38:47 5 Is that because you didn't think that there was any
6 kind of imminent danger?

7 A. Well, I thought because of the close proximity in the
8 hallway, I didn't want to muzzle the two guys in front of me
9 that may encounter somebody.

14:39:05 10 Q. Now, when you arrived at the end of the house, before
11 you went upstairs, did the three of you have any discussion,
12 based on what you knew up to that point about the situation
13 with Brian Garber, of any tactical plan to figure out how
14 you were going to approach the situation?

14:39:25 15 A. No.

16 Q. Was there any discussion of who would deploy in
17 certain locations?

18 A. No.

19 Q. Whether somebody should go into the room or stay
20 outside, where there's some protection and safety because of
21 walls?

22 Did anybody talk about that?

23 A. No.

24 Q. You were on the SWAT team at one point, were you not?

14:39:56 25 A. Seven years. Yes, sir.

1 Q. And when you went to a house where they were serving a
2 warrant or a search warrant or arresting somebody who might
3 be a potential danger, you come up with a tactical plan,
4 don't you?

14:40:12 5 A. You have a raid plan, yes.

6 Q. And you basically get together, and you discuss the
7 order of who is going out, you're going in, what safety
8 measures you're going to take, how you're going to approach
9 the suspect, how to keep -- maintain control and all those
14:40:28 10 things, right?

11 A. That's correct, yes.

12 Q. Okay. But you didn't do that here, correct?

13 A. No, sir.

14 Q. All right. Even though you had heard that he might
14:40:38 15 have a gun?

16 A. Yes.

17 Q. Okay. Who was in charge among -- okay.

18 So you have Knee, Nicholson, and yourself going
19 upstairs.

14:40:51 20 A. Correct.

21 Q. There's a Lieutenant Zehner, right?

22 A. Yes.

23 Q. And where was he?

24 A. He was on the stairwell as we were going upstairs.

14:41:04 25 Q. All right. So he was not out in the hallway; is that

1 right?

2 A. I can't tell you if he made it to the hallway or not.

3 But I know he was in the stairway at one time.

4 Q. But as to the events that took place at the doorway,
14:41:18 5 who was in charge?

6 A. Sergeant Nicholson.

7 Q. Okay. You decided, of your own choice, to go into
8 that room, correct?

9 A. Yes, I did.

10 Q. Sergeant Nicholson -- you did not tell
11 Sergeant Nicholson, I'm going into the room with a man who
12 might have a gun?

13 A. No, I didn't.

14 Q. He did not direct you to go into the room, did he?

15 A. No, he didn't.

16 Q. Do you believe it might have been a bad idea to go
17 into this room knowing that -- or believing that this man
18 may have a gun, without cover, exposing yourself and the
19 other two fellow officers to a deadly danger, if Brian
20 actually had a gun, right?

21 MS. WILLIAMSON: Objection. Form.

22 THE COURT: What's your objection?

23 MS. WILLIAMSON: Form, Your Honor. It was a
24 long question with lots of subparts to that.

25 THE COURT: All right. Break it down.

1 MR. GILBERT: Okay.

2 BY MR. GILBERT:

3 Q. You decided to go, on your own, into the interior of
4 that room, expose yourself to somebody that you believe
14:43:00 5 might be armed, right?

6 A. Yes, sir.

7 Q. Did you think that that might be a bad idea?

8 A. No, sir.

9 MR. GILBERT: Would you pull up Exhibit 1,
14:43:21 10 page 31, line 4 and 5.

11 MS. WILLIAMSON: Objection, Your Honor.

12 MR. GILBERT: This is impeachment, Your Honor.

13 MS. WILLIAMSON: It's being published to the
14 jury right now, the transcript? Is it off?

14:43:39 15 DEPUTY CLERK: It's off.

16 MS. WILLIAMSON: It's off my screen.

17 THE COURT: Objection is overruled.

18 MR. GILBERT: Thank you.

19 All right. I want to make sure. Okay.

14:43:48 20 THE COURT: And what's the lines on this one?

21 MR. GILBERT: Page 31.

22 THE COURT: Lines . . .

23 MR. GILBERT: -- line 4 and 5.

24 Is it up?

14:44:06 25 THE COURT: Are you asking to publish it?

1 MR. GILBERT: Okay.

2 No.

3 BY MR. GILBERT:

4 Q. I'm going to ask you this:

14:44:12 5 Did you say under oath in a previous proceeding, that
6 it was not -- it was not the smartest thing to do in the
7 world -- Was it the smartest thing to do in the world?

8 Probably not.

9 A. I remember saying that, yes.

14:44:27 10 Q. Okay. So it probably wasn't the most smartest thing
11 to do, right?

12 A. Probably not, no.

13 THE COURT: Just to clarify the record, this
14 is Plaintiff's Exhibit 1?

14:44:44 15 Is that what you're referring to?

16 MR. GILBERT: Yes. Yeah. It's not an
17 exhibit. I mean, it's not going to be admitted.

18 THE COURT: All right. Just so we can
19 identify it for the record.

14:44:51 20 MR. GILBERT: Right.

21 BY MR. GILBERT:

22 Q. And it's not a smart thing because you're being put in
23 a potential sitting duck position, correct?

24 A. Correct.

14:45:02 25 Q. And that could provoke a situation that no one wants,

1 correct?

2 A. I can't say that it wouldn't.

3 Q. Okay. But it increases the risk of a volatile
4 provocation situation when you go in the room, and you stand
14:45:17 5 in front of somebody on a bed who might have a gun?

6 A. It could, certainly. Yes.

7 Q. Policing involves safety and safe practices, does it
8 not?

9 A. Yes.

14:45:39 10 Q. Because you want to protect yourself and others; is
11 that right?

12 A. Yes, sir.

13 Q. Now, I believe you had said throughout this case, and
14 correct me if I'm wrong, that from the time you got to the
14:46:00 15 room until the time the shooting began, there was about
16 45 seconds to a minute; is that correct?

17 A. Close to that, yeah.

18 Q. And that Sergeant Nicholson and you were trying to get
19 Brian to show his hands, and, I guess -- I suppose, convince
14:46:22 20 him to drop the weapon, right?

21 A. Yes, sir.

22 Q. Okay. And were you -- were you shouting and talking
23 over each other?

24 A. No. Initially, I started with commands of, Drop your
14:46:36 25 weapon. Drop your weapon. And then --

1 Q. Who was the first one to speak to Brian?

2 A. I was.

3 Q. Are you sure about that?

14:46:52 4 A. I believe so, yes. If anybody else was speaking, I

5 couldn't hear them over top of me.

6 Q. Well, isn't it important to hear what -- to have a
7 person who is potentially a danger, that that person is
8 given clear and audible commands that could be understood?

9 A. That is correct, yes.

14:47:11 10 Q. And if you're talking over each other, yelling and
11 shouting, that could cause confusion, could it not?

12 A. It could, yes.

13 Q. And when you went into the room, is it at that point
14 when you pulled out your weapon and pointed it at Brian?

14:47:35 15 A. When he says he has a gun, yes.

16 Q. Okay. And that's -- and you pointed the gun at him,
17 correct?

18 A. Directly at him, yes.

19 Q. All right. And you had no escape route at that point;
14:47:49 20 is that right?

21 A. None.

22 Q. Well, was there anything preventing you physically --
23 physically -- for saying, He's got -- He says he's got a
24 gun, let's get out of here and back off?

14:48:01 25 A. No.

1 Q. There was nothing physically to prevent you from
2 telling Knee and Nicholson, He's got a gun. You got to get
3 out of here?

4 A. Not safely, no.

14:48:13 5 Q. Okay. Well, was there any -- you could still have the
6 gun on him as you're backing out, right?

7 A. Then that would draw fire towards the other two
8 officers in the doorway, and we would all be bunched up
9 there if he opened fire on us.

14:48:28 10 Q. And that's all because you went into the room without
11 getting permission; that you put deployment of the three of
12 you in a different position than would have been safe?

13 A. I disagree with that.

14 Q. Okay.

14:48:58 15 MR. GILBERT: I'm going to be referring to
16 Exhibit 2, page 51.

17 BY MR. GILBERT:

18 Q. Did you -- did you in a previous proceeding --
19 So you had time --

14:49:31 20 "Question: So you had time to back out to assess the
21 situation, did you not?"

22 That was a question posed to you.

23 I think I asked you had that.

24 A. I don't understand that question.

14:49:43 25 Q. Okay. The question was -- tell me if you recall this

1 question and answer.

2 "So you had time to back out to assess the situation,
3 did you not?"

4 A. I don't recall that question.

14:49:54 5 Q. Okay. And then the answer was, "Correct."

6 A. I don't recall that, no.

7 Q. Okay.

8 MR. GILBERT: Could you pull up the -- can you
9 pull up --

14:50:08 10 Can I pull up the --

11 THE COURT: Show it to the witness.

12 MR. GILBERT: Do you want me to carry it over
13 there to show him?

14 THE COURT: That would be fine. Old-school --

14:50:15 15 MR. GILBERT: Or can we put it on the screen?

16 THE COURT: Can you put it on the screen for
17 the witness.

18 DEPUTY CLERK: I can put it on the screen for
19 the witness.

20 THE COURT: Yeah. For the witness, we can put
21 it on the screen.

22 MR. GILBERT: Okay.

23 So that would be from page 51 to 52. Lines 24, 25 on
24 51, to 17 on 52.

14:50:37 25 THE COURT: Give me those lines, again.

1 MR. GILBERT: Page 51, bottom, 24, 25 line;
2 and 52, from 1 to 17.

3 THE COURT: Okay. Got it.

4 MR. GILBERT: I mean, I could also just show
14:51:00 5 it to him.

6 DEPUTY CLERK: He should have it.

7 Do you have it on your computer?

8 THE WITNESS: I have nothing.

9 THE COURT: Why don't you approach the
14:51:10 10 witness.

11 MR. GILBERT: Thank you.

12 THE COURT: Is it in the book?

13 MS. GREENE: It's in the book.

14 THE COURT: All right. Why don't we give him
14:51:19 15 the book, and have him view the transcript there.

16 BY MR. GILBERT:

17 Q. So I want you to read from this line, 24 on this page,
18 to line 17 on the next page.

19 A. "Question: Okay. So you had time to back out to
14:52:16 20 assess the situation, did you not?"

21 Q. And there were objections.

22 A. There were some objections by my attorney.

23 Q. And then the answer.

24 A. Where would you like me to start --

14:52:29 25 Q. And I said --

1 A. -- 17?

2 Q. 16.

3 A. 16?

4 "Can you answer that question."

14:52:34 5 And my answer was, "Correct."

6 Q. Okay. So does that refresh your recollection that in
7 a previous --

8 MS. WILLIAMSON: Objection, Your Honor. He
9 skipped his answer to the question. It was -- I mean,
14:52:47 10 line 3 is his answer.

11 THE COURT: Sustained. He's admitted that
12 that was his testimony.

13 BY MR. GILBERT:

14 Q. So you did have time to get out and assess the
14:53:00 15 situation?

16 A. Time and safety are two different things.

17 Q. Okay. I asked you, you had time to get out of that
18 room?

19 A. I had time, yes.

14:53:09 20 Q. Okay. That's all.

21 To assess the situation.

22 Okay. Now, when you pointed your gun at Brian, you
23 thought he had a gun underneath his shirt, right?

24 A. Yes, sir.

14:53:39 25 Q. But you did not actually see a gun, correct?

1 A. I had never seen a gun, no.

2 Q. Now, while you were pointing the gun at him, there was
3 a lot of talking going on. Drop the gun. We have families.
4 Don't do it.

14:54:10 5 Did he ever --

6 A. I'm sorry.

7 Q. Did Brian ever actually threaten to shoot you or
8 anybody else?

9 A. No.

14:54:27 10 Q. And for 45 seconds to a minute, which is the time
11 frame that you were in the room before shots were fired,
12 during that period of time, there was no -- there was
13 nothing physical to prevent you from leaving that room?

14 A. Other than having what appeared to be a gun pointed at
15 me from underneath his shirt.

16 Q. But you didn't -- you didn't shoot him for 45 seconds
17 to a minute, correct?

18 A. That's right, I did not.

19 Q. Even though -- even though he was pointing a gun at
20 you?

21 A. That's correct, yes.

22 Q. Or what you believed to be a gun?

23 A. Correct.

24 Q. Well, I would -- I would think that any officer who
25 has a gun pointed at him would want to neutralize that

1 threat, correct?

2 A. That's not true at all.

3 Q. You wait -- you wait until he shoots you?

4 A. He's in crisis situation. I'm not just going to walk
14:55:30 5 in and shoot somebody.

6 Q. All right. If he had got a shot off -- if he had a
7 gun, he could have gotten a shot at -- out at you before you
8 had any time to react, right?

9 A. Sometimes that's part of our job.

10 Q. Or he could have shot any of the other two, if he had
11 a gun?

12 A. That's correct.

13 Q. But he didn't have a gun?

14 A. We know --

15 Q. And you stood --

16 A. -- now that he didn't have a gun.

17 Q. And you stood there for 45 seconds to a minute with --
18 claiming and telling this jury that there was a gun pointed
19 at you, and you didn't -- you didn't shoot him?

20 A. I'm not the habit of just walking in and shooting
21 people.

22 Q. Isn't it a fact that you didn't shoot him because you
23 didn't feel the need to shoot him?

24 A. That's not true at all.

25 Q. And you had testified, had you not, before, that you

1 did not shoot until you heard a pop?

2 A. That's correct.

3 Q. A loud bang?

4 A. That's correct.

14:56:32 5 Q. Or a pop?

6 A. Yes.

7 MR. GILBERT: Page 56, lines 21 to 25.

8 So we're not using this?

9 MR. DOUGLAS: I can do it now.

14:57:04 10 Can I do it?

11 DEPUTY CLERK: The TVs are not on in the jury
12 box, correct?

13 Do you want them on for the witness?

14 THE COURT: Yes. The witness can view.

14:57:10 15 THE CLERK: Okay.

16 THE COURT: All right.

17 BY MR. GILBERT:

18 Q. You just told the jury that you never said you didn't
19 feel the need to shoot Brian Garber during the 45 seconds to
14:57:24 20 a minute, right?

21 A. Correct.

22 Q. Okay.

23 MR. GILBERT: Now, what did I do with my copy?

24 Sorry.

14:58:12 25 BY MR. GILBERT:

1 Q. All right. Do you see it says there, page 21 -- on
2 line 21, "And despite all the commands and references to a
3 gun during that period of time -- we don't have to go over
4 all the details -- prior to hearing the pop, you did not see
14:58:27 5 the need -- the need to use deadly force, correct?"

6 A. Correct.

7 Q. And you agreed with me then?

8 A. Correct.

9 Q. Okay. So when I asked you whether you felt -- whether
14:58:45 10 you felt you needed to -- whether you didn't need to use
11 deadly force during that period of time, I think you said, I
12 didn't need to -- I didn't need to, right?

13 So is it -- so now you're saying -- now you said you
14 needed -- you could have used deadly force, but before you
14:59:03 15 said you didn't need to use it, right?

16 MS. WILLIAMSON: Objection, Your Honor.

17 THE COURT: Rephrase.

18 MR. GILBERT: Okay.

19 BY MR. GILBERT:

20 Q. Anyway, this speaks for itself.

21 Do you agree with that statement you made, that you
22 did not see the need to use deadly force?

23 A. I agree with that.

24 Q. Okay. And the only reason that you used deadly force
14:59:29 25 was because you heard a pop?

1 A. That's not the only reason.

2 Q. But you didn't shoot him beforehand, right?

3 A. Like I said, he was in crisis mode. We were trying to
4 help him.

14:59:41 5 Q. But what caused you to pull the trigger was the pop,
6 right?

7 A. Was the pop, yes.

8 Q. Okay. When you say you heard a pop, it was really a
9 loud bang, was it not?

15:00:01 10 A. I described it as a pop, if I'm not mistaken.

11 Q. It sounded like a gunshot, right?

12 A. It was a muffled pop, what I -- it sounded like a
13 gunshot to me, yes.

14 Q. Well, did you -- were you not sure?

15:00:20 15 A. I am sure.

16 Q. Okay. A gun produces a distinct sound, does it not?

17 A. It does, depending on where you're at, yes.

18 Q. Especially in a small room?

19 A. It does sound different in a room as opposed to
15:00:35 20 outside.

21 Q. It would be louder in a room than it would be outside,
22 would it not?

23 A. No.

24 Q. No?

15:00:48 25 Would you say that the need to use deadly force, that

1 your understanding is that it should not be used unless
2 there is an imminent danger of serious physical harm?

3 A. Correct.

4 MR. GILBERT: Would you pull up Joint
15:01:16 5 Exhibit 5.

6 Well, the top part here.

7 BY MR. GILBERT:

8 Q. Do you see that?

9 MS. WILLIAMSON: Objection, Your Honor.

10 THE COURT: Excuse me?

11 MS. WILLIAMSON: I'm objecting to the use of
12 this exhibit. I thought the policies are not part . . .

13 THE COURT: I don't understand -- I don't
14 understand your objection.

15:01:43 15 It's a joint exhibit, isn't it?

16 MS. WILLIAMSON: It is a joint exhibit. We
17 left it in just for purposes of -- I guess impeachment
18 purposes. But pursuant to the rulings, I believe that the
19 policies were out.

20 MR. GILBERT: I just want him to acknowledge
21 what his standards are of this policy.

22 THE COURT: You may inquire.

23 MR. GILBERT: Okay.

24 DEPUTY CLERK: Should I publish it?

15:02:12 25 BY MR. GILBERT:

1 Q. You've seen these policies before, right?

2 A. Yes, sir, I have. Yes.

3 Q. And there's a number of circumstances where deadly
4 force is justified, right?

15:02:23 5 A. That's correct, yes.

6 Q. The first one is, "To defend himself or herself from
7 what is reasonably believed to be an imminent threat of
8 serious physical harm and death," right?

9 A. That's correct, yes.

15:02:39 10 Q. Is that the standard that you used that day?

11 A. Yes.

12 Q. All right.

13 MR. GILBERT: Can you go down a bit.

14 Okay. Keep going.

15:02:51 15 All right.

16 BY MR. GILBERT:

17 Q. Where it says, "B: Use of deadly force."

18 "Prior to discharging a firearm to protect human life
19 or prevent the escape of a fleeing felon, employees shall
20 identify themselves as sheriff's office employee, and give
21 warning of their intent to shoot, when feasible."

22 A. I believe pointing a gun at somebody is --

23 Q. I didn't ask you -- I only asked you, is this in your
24 policy, right?

15:03:22 25 A. Yes, it is.

1 Q. Okay. And it says here, "Give warning of their intent
2 to shoot, when feasible."

3 Do you see that?

4 A. I do, yes.

15:03:38 5 Q. Okay. And you were in that room for 50 seconds.

6 Did you ever tell Brian Garber if he doesn't drop the
7 gun, You're going to be shot and killed?

8 A. No.

9 MR. GILBERT: You can take that down.

15:04:02 10 BY MR. GILBERT:

11 Q. At the time that you heard the pop, or the loud bang,
12 whatever it was, you were looking at Brian Garber, straight
13 ahead, right?

14 A. Straight at his chest.

15:04:15 15 Q. All right. And did you see a muzzle flash?

16 A. I did not.

17 Q. And if there was a muzzle flash, you would have seen
18 it, correct?

19 A. I never seen a gun fired from underneath a shirt
20 before, so I don't know. I can't answer that.

21 Q. And are you telling this jury that you did not create
22 that loud noise, that pop?

23 A. I am absolutely sure.

24 Q. And if that was a gunshot, a real gunshot, there was
25 nobody else in that room with a gun, correct --

1 A. Correct.

2 Q. -- besides you, Knee, and Nicholson?

3 A. That's correct, yes.

4 Q. Okay. You claim it wasn't from you, right?

15:05:21 5 A. That's right, yeah.

6 Q. Okay. And you have testified before that it could not
7 have come from Knee or Nicholson, correct?

8 A. I don't believe it did, no.

9 Q. There was no ghost in that room, was there?

15:05:34 10 A. No, sir.

11 Q. And you are maintaining that the popping -- or the
12 popping sound came directly from Garber?

13 A. Yes, I am.

14 Q. Did you see anything there that could have been in --
15 near Garber that could be something that would create the
16 sound of a gunshot?

17 A. No.

18 Q. And until this day, as you sit here right now in this
19 trial, almost five years later, have you found anything that
20 could have created a sound like that, other than a firearm?

21 A. I haven't looked.

22 Q. Well, other people have looked, have they not?

23 A. I don't know.

24 Q. But you were in the -- inside of the room, the one
15:06:51 25 deputy out of the three that was in the most dangerous

1 position, correct?

2 A. Yes, sir.

3 Q. If anybody had the so-called logic to fire, based on
4 what you've been telling us, it would have been you, right?

15:07:08 5 Because you were the one facing the danger.

6 A. Not necessarily.

7 Q. And you've never come up with even a theory of how
8 that gunshot sound could have come from any other source
9 other than a gun?

15:07:34 10 A. No, sir.

11 Q. And is it your position that the reason that you
12 start -- pulled the trigger and fired at Brian Garber was
13 the sound of the shot, right?

14 A. Yes.

15:07:57 15 Q. How many times did you shoot?

16 A. Eight to ten.

17 Q. And did you fire those in rapid succession?

18 A. Less than 2 seconds.

19 Q. What's that?

15:08:09 20 A. Less than 2 seconds, probably.

21 Q. There was no pause by any of the shots?

22 A. Not to my knowledge.

23 Q. Okay. And where were you shooting at?

24 A. Center mass, his chest.

15:08:33 25 Q. And did you hear other shots besides the shots that

1 you fired?

2 A. I heard the two officers firing beside me, yes.

3 Q. And they were all simultaneous?

4 A. All simultaneous.

15:08:48 5 Q. Okay. And so the total -- you would say the total
6 barrage of shots was about what? 2 seconds?

7 A. About 2 seconds or so, yeah.

8 Q. And when you were firing, did you watch what
9 Brian Garber was doing?

15:09:02 10 A. I'll say yes.

11 Q. Okay. Did you see him slump over?

12 A. Yes.

13 Q. Okay. To which way -- which direction?

14 A. To his right side, between the bed and the wall.

15:09:15 15 Q. Okay. So if you're looking at him, he would be going
16 to -- from looking at him from your angle, to the left, but
17 from him, to the right?

18 A. Yes.

19 Q. Okay. And weren't you concerned as to whether --
20 after the shots were fired, whether he still had a gun?

21 A. He appeared to be -- the threat appeared to be --

22 Q. I'm just asking yes or no. That's all right now.

23 A. Repeat the question, please.

24 Q. Okay.

15:09:48 25 You had just shot and maybe killed somebody.

1 Were you interested in knowing if there was a gun
2 there, finding the gun, and putting it in a safe position?

3 A. That's more than one question.

4 Q. Okay. Well, did you look for the gun?

15:10:06 5 A. No.

6 Q. Did you see -- did you see a gun?

7 A. No.

8 Q. Did you see an object in his hands?

9 A. No.

15:10:15 10 Q. Did you see an object anywhere near him?

11 A. No.

12 Q. Did you tell anyone while you were in that room, after
13 the shooting, that you thought you were shot?

14 A. I thought I was hit by an object, yes.

15:10:34 15 Q. Okay. Well, did you think you were shot?

16 A. I didn't know if I was or not, but I wasn't taking any
17 chances.

18 Q. All right. Well, it turned out that you weren't shot,
19 right?

15:10:46 20 A. No, that's correct. I don't know what hit my uniform.

21 Q. And you were not hit with anything, right?

22 A. I still don't know that.

23 Q. Well, you were wearing a vest, were you not?

24 A. Correct.

15:10:58 25 Q. And where was the feeling that you had been hit with

1 something?

2 A. Just above my left breast pocket.

3 Q. So it was underneath the vest?

4 A. No.

15:11:16 5 Q. It was where?

6 A. I felt it on the outside.

7 Q. On the outside?

8 A. Yes.

9 Q. You could feel your body from the outside when there's
15:11:22 10 a bulletproof vest on you?

11 A. Well, if something hits you, yes, you would know that.

12 Q. Did you ever find out what that was?

13 A. No, I haven't.

14 Q. Okay. And did you think that the gun, which isn't a
15:11:42 15 gun, or the object, which we don't know what it is,

16 would -- might have fallen between the bed and the window?

17 A. That was our initial thought, yes.

18 Q. Okay.

19 MR. GILBERT: I'm going to show Exhibit 28-11.

15:12:10 20 And just to let the jury know, this is the one crime
21 scene photo that we agreed on.

22 THE COURT: That I'm permitting.

23 MS. WILLIAMSON: Your Honor?

24 THE COURT: Yes.

15:12:24 25 MS. WILLIAMSON: We have an objection.

1 Perhaps we should address this sidebar.

2 THE COURT: All right. We can come to
3 sidebar, but I --

4 I'll hear you.

15:12:33 5 MS. WILLIAMSON: Thank you, Your Honor.

6 (Discussion held at sidebar, as follows:)

7 MS. WILLIAMSON: Thank you, Your Honor.

8 We received the exhibit. I think it was your ruling
9 that just came to me that said that this --

15:13:00 10 THE REPORTER: I can't hear you.

11 MS. WILLIAMSON: Okay. Let me stand over
12 here.

13 THE REPORTER: That's better.

14 MS. WILLIAMSON: The ruling that we had that
15 the crime scene photo that is allowed in could be in black
16 and white, we received that copy from plaintiff's counsel.
17 However, it appears to not just be a black and white copy,
18 but it's also zoomed in closer than the original version of
19 this photograph.

15:13:17 20 This is the original version of the photograph. Just
21 like looking at what the exhibit is, you can tell it's
22 pulled closer. He appears larger.

23 THE COURT: Do you have it as you're going to
24 post?

15:13:28 25 MR. GILBERT: It's not what she said, your

1 Honor.

2 (Sidebar continued off the record.)

3 THE COURT: The objection to the exhibit
4 overruled.

15:14:14 5 (End of sidebar discussion.)

6 (Proceedings resumed in open court.)

7 THE COURT: We are at 3:15, counsel. We
8 haven't taken an afternoon break.

9 Is this an appropriate time to take 15 minutes?

15:14:30 10 MR. GILBERT: That's okay. That's fine.

11 THE COURT: All right.

12 We are going take a 15-minute recess, and Mr. DeVan
13 will take you back to the jury room. And we will resume at
14 3:30.

15:14:44 15 Again, all the admonitions I've given you about
16 communicating, talking with each other.

17 Please place your notebooks back in the envelopes, and
18 leave them on your seats.

19 DEPUTY CLERK: All rise.

15:15:37 20 THE COURT: Court is in recess until 3:30.

21 - - - - -

22 (The jury exited the courtroom.)

23 (Proceedings in recess at 3:15 p.m.)

24 - - -

15:31:51 25 DEPUTY CLERK: All rise. Please be seated.

1

- - -

2

(Proceedings commenced at 3:30 p.m.)

3

(In Open Court - Jurors Not Present)

4

(Defendant Present)

15:32:03 5

- - -

6

7

THE COURT: Before I bring the jury back in, there's been an inquiry about the stipulations of fact.

8

15:32:15 10

My recollection is at the final pretrial, we agreed that it was not necessary to give that stipulation as part of the instructions to the jury, initially, but we hadn't made a final decision on when it would be read. The alternatives being after opening statement, or as part of the evidence before we have closing argument.

14

I don't intend to do it now.

15:32:39 15

However, what is counsel's thought on doing it between Officer Frazier's testimony and the next witness?

17

18

MR. GILBERT: I really don't have any preference.

19

THE COURT: Preference, one way or the other?

15:33:03 20

MR. DOWNEY: I would defer to the Court.

21

22

THE COURT: Okay. All right. We'll decide that after Officer Frazier is done testifying.

23

Do you expect to finish your --

24

MR. GILBERT: Yes.

15:33:17 25

THE COURT: -- your cross-examination today?

1 MR. GILBERT: Yes.

2 THE COURT: And probably, you would not finish
3 your examination of him today, would you?

4 MR. GILBERT: He's --

15:33:27 5 THE COURT: Or do you intend to bring him
6 back?

7 MR. DOWNEY: We will call him back in our
8 case, Your Honor.

9 THE COURT: You'll call him back as a part of
15:33:36 10 your case.

11 So there will be no examination at this time?

12 MR. GILBERT: Correct.

13 THE COURT: All right. So when we're finished
14 with Officer Frazier, then we'll adjourn, or recess, until
15:33:47 15 tomorrow.

16 MR. GILBERT: Okay.

17 THE COURT: Okay?

18 MR. GILBERT: We wanted to go to 5:30. We
19 could call somebody else.

15:33:53 20 THE COURT: Well -- and, quite frankly, if we
21 can get him out about 5:00, so much the better for the
22 jurors, so . . .

23 MR. GILBERT: Okay.

24 THE COURT: We'll go to 5:30 when necessary,
15:34:05 25 but we'll try to always do better than that.

1 All right. So, Mr. DeVan, bring back the jury.

2 DEPUTY CLERK: All rise for the jury.

3 (The jury entered the courtroom.)

4 DEPUTY CLERK: Please be seated.

15:35:47 5 THE COURT: Officer Frazier, will you please
6 retake the stand.

7 I'll remind you that you're still under oath.

8 And, Mr. Gilbert, you may proceed with your
9 examination.

15:36:07 10 MR. GILBERT: Thank you.

11 CONTINUED CROSS-EXAMINATION OF RAYMOND JEFFREY FRAZIER
12 BY MR. GILBERT:

13 Q. Mr. Frazier, I wanted to ask you a question about at
14 the time of the shots fired.

15:36:17 15 When you fired -- when you heard the pop, that was
16 what -- you said that was what caused you to pull the
17 trigger?

18 A. Yes.

19 Q. Did you see any movement from Brian Garber when you
15:36:34 20 fired the shot?

21 A. Yes.

22 Q. What kind of movement did you see?

23 A. He leaned forward, and lifted his shirt slightly with
24 his left hand.

15:36:43 25 Q. Was that after the pop?

1 A. I believe it was right before the pop.

2 Q. Are you sure?

3 A. I'm not 100 percent positive.

4 Q. Okay. But you had already decided to shoot before you
15:36:57 5 saw that, right?

6 A. Yes.

7 Q. Okay. I want to show you Exhibit 28-11.

8 MR. GILBERT: And this is not shown to the
9 jury at this point, right?

10 15:37:22 THE COURT: Right.

11 MR. GILBERT: Right.

12 THE COURT: Not at this point.

13 MR. GILBERT: All right.

14 BY MR. GILBERT:

15 15:37:25 Q. Showing you what's been marked as 28-11, Plaintiff's
16 Exhibit, this photograph.

17 Does that depict accurately the position of
18 Brian Garber's body after the shots were fired?

19 A. Yes.

20 15:37:44 Q. Okay.

21 MR. GILBERT: Can we publish this, Judge?

22 THE COURT: Any objection?

23 MS. WILLIAMSON: No, Your Honor.

24 THE COURT: It may be published.

25 15:37:58 MR. GILBERT: Thank you.

1 BY MR. GILBERT:

2 Q. Now, in this -- do you see anything protruding from
3 his shirt in that picture?

4 A. No, I do not.

15:38:11 5 Q. Do you see anything in -- anything in his hands?

6 A. I can only see one of his hands.

7 Q. Did you ever see the other hand?

8 A. I'm not sure when you're talking about.

9 Q. When you -- did you ever go -- go up to the bed to
15:38:27 10 look?

11 A. I did, yes.

12 Q. And did you see anything in the other hand?

13 A. I didn't get that close to him.

14 Q. All right.

15:38:34 15 A. I went to the end of the bed.

16 Q. All right. And do you know how his hands got up to
17 that point, to the right, by his head, after the shots?

18 A. No, I don't.

19 Q. Did you see his hands -- when you were firing, did you
15:38:48 20 see his arms go up to the right?

21 A. No, I don't believe so.

22 Q. You were trained -- your eyes were trained on him all
23 the time, right?

24 A. That's right.

15:39:00 25 Q. All right. And so you didn't see movement -- movement

1 from underneath his shirt to where his arms were located
2 after the shot, correct?

3 A. I seen his whole body moving backwards. That's all I
4 seen.

15:39:17 5 Q. Okay. And do you see the object to the left of his
6 left leg?

7 A. Yes, I do.

8 Q. All right. Did you see that object after the
9 shooting?

15:39:29 10 A. I can't say that I did, no.

11 Q. Well, either you -- you don't remember whether you saw
12 it?

13 A. I don't remember if I saw it or not.

14 Q. All right. It's pretty visible right there, is it
15 not?

16 A. Yes, it is.

17 Q. And you have no idea how it got there, correct?

18 A. No, I don't.

19 Q. And you would have thought that the gun, if it was a
20 gun, or the object in his hand, would have fallen onto the
21 floor between the bed and the wall, where the window is,
22 right?

23 A. That was the belief, since we didn't see a gun, yes.

24 Q. Okay. But the way the body is positioned, that's kind
25 of where you thought it went, right?

1 A. That's correct, yes.

2 Q. All right.

3 MR. GILBERT: You could remove the exhibit.

4 BY MR. GILBERT:

15:40:22 5 Q. Did you see at any time, Brian lift up his shirt with
6 his left hand, and pull out what appeared to be a gun from
7 under his shirt?

8 A. He lifted his -- lifted his shirt --

9 Q. Just wait a second.

15:40:40 10 A. All right. Go ahead.

11 Q. Did you -- did you see Brian pull out what appeared to
12 be a gun from under his shirt and then fire?

13 A. Pull out? No.

14 Q. Pull out.

15:40:52 15 A. All right. Do you recall your written statement,
16 which is Exhibit 6, that you provided to the authorities?

17 A. I don't have a photographic memory.

18 Q. Okay. I'll get it for you.

19 A. I guess the better question would be: Did you see
20 Brian lift up his shirt with his left hand, and with his
21 right hand, pull out what appeared to be a gun before you
22 heard the shot -- the pop?

23 A. I don't recall.

24 MR. GILBERT: Can I approach?

15:41:58 25 THE COURT: You may.

1 MR. GILBERT: It's the bottom of page 6.

2 Can we show the witness the bottom of page 6 of
3 that --

4 THE COURT: Yes, you may.

15:42:11 5 MR. GILBERT: -- Exhibit 6?

6 Keep going down. Okay.

7 BY MR. GILBERT:

8 Q. Okay. It says there, "He lifted his shirt up slightly
9 with his fingers of his left hand, and with his right hand,
15:42:46 10 he pulled out what appeared to be a firearm from under his
11 shirt. As he started to extend his right hand out toward
12 me, I heard a loud popping sound."

13 A. Yes, I see that.

14 Q. You see that.

15:43:02 15 Did you see him pull out what appeared to be a firearm
16 from under his shirt?

17 A. If I put it here in my statement, I did, yes.

18 Q. Well, it reads to me, like, he -- when you pull
19 something out and extend it, it means -- that's what it
15:43:18 20 means, not anything else, right?

21 So was this not phrased properly?

22 A. I really don't know how to explain that.

23 Q. All right.

24 MR. GILBERT: Take it down.

15:43:41 25 BY MR. GILBERT:

1 Q. Did you see Brian before hearing the pop, move his
2 shirt up -- move his shirt up, and raise his hand?

3 A. I never seen him raise his hand.

4 Q. Okay.

15:43:53 5 A. I seen him move his shirt up.

6 Q. All right.

7 A. I'm not sure what you mean by the second part.

8 MR. GILBERT: Would you -- would you put in
9 Exhibit 1, page 23, lines 18 to 20.

15:44:22 10 23. That's right.

11 BY MR. GILBERT:

12 Q. Do you see here where you say under oath in a prior
13 proceeding, "And then just all at once, moves his shirt up,
14 and he raises his hand, and there's a pop?

15:44:41 15 A. Yes, I do see that.

16 Q. Okay. So do you -- does this refresh your
17 recollection that you had said before that he raised his
18 hand?

19 A. Yes, it does. Yes.

15:44:49 20 Q. Okay. That is not accurate, is it?

21 That is not what you said before, in front of the jury
22 today.

23 Do you understand?

24 A. I don't -- I don't understand.

15:45:05 25 Q. It's not the same that you said, that there was some

1 slight movement underneath the shirt.

2 A. I don't remember you asking me that.

3 Q. Okay. Well, the jury will remember.

4 Did you ever say before the pop sound, that he was
15:45:26 5 bringing his hand out of his shirt?

6 A. I wasn't asked that today.

7 Q. I'm sorry?

8 A. You didn't ask me that.

9 Q. No. I'm asking you now.

10 Did you ever say that he was bringing his hand out of
15:45:36 11 the shirt?

12 A. I don't recall.

13 MR. GILBERT: Would you go to page 24, lines 2
14 to 10. I think that's not . . .

15:46:02 15 BY MR. GILBERT:

16 Q. Do you see where it says on line 9, "He was bringing
17 his hand out of his shirt, and moving it forward"?

18 A. Yes, I do.

19 Q. Okay. Is that correct?

20 A. Yes.

21 Q. Do you remember saying in an interview that Brian
22 brandished what looked like a gun from underneath his shirt?

23 A. I said what appeared to be a gun.

24 Q. Do you know what "brandish" means?

25 A. Show.

1 Q. Okay. But you never saw him show any object, correct?

2 A. No, that's not true.

3 Q. You didn't -- you said you didn't see anything outside
4 of the shirt.

15:46:45 5 A. I testified that I seen what appeared to be a firearm,
6 yes.

7 Q. Okay. "Brandish" means show or display.

8 Did you see a gun brandished and displayed?

9 A. No. I never stated that I seen a gun.

15:47:05 10 Q. I'm asking, did you see a gun brandished and
11 displayed?

12 A. No.

13 Q. And, once again, it -- you maintain today that the
14 reason you pulled the trigger was the sound of the pop,
15 right?

16 A. Yes, that is correct. Yes.

17 Q. Okay. And is it your testimony that he did -- he
18 never pulled out -- pulled out a firearm from under his
19 shirt?

15:47:37 20 A. That's correct.

21 Q. Okay. So would you show -- let me show you Exhibit 6,
22 again.

23 MR. GILBERT: Bottom of page 6.

24 BY MR. GILBERT:

15:48:05 25 Q. Where it says, once again, "He pulled out what

1 appeared to be a firearm."

2 A. Your question was, did he pull out a firearm?

3 My statement is, he pulled out what appeared to be a
4 firearm.

15:48:22 5 Q. Okay. Well, what was -- what did you see in his hand?

6 A. A black object.

7 Q. Okay. Now, you're saying you saw a black -- a black
8 object?

9 A. Yes.

15:48:30 10 Q. When did you see the black object?

11 A. When he lifted his shirt. That's what appeared to be
12 a firearm. That was my descriptor of a firearm.

13 Q. You said you never saw anything come out from under
14 the shirt. You told us that.

15:48:48 15 A. My testimony, and I believe in my original statement,
16 it says that I seen what appeared to be a firearm.

17 Q. You actually saw an object in his hand?

18 A. I saw something black. What the description of it --

19 Q. What did it look like?

15:49:11 20 A. A piece of something black. I can't describe it to
21 you.

22 Q. And any -- there's a million things that could be
23 black. Not every one -- every one of them look like a
24 firearm.

15:49:23 25 A. Sure. You're right.

1 Q. Okay. You didn't tell this jury before that you never
2 saw what was underneath his shirt?

3 A. I don't recall.

4 Q. Okay. Did you ever see his hand come out of his
15:50:15 5 shirt?

6 A. Which hand?

7 Q. His right hand.

8 A. I never seen it come all the way out. I seen a black
9 object that appeared to be a firearm when he lifted his
15:50:28 10 shirt with his left hand. That's what I've always testified
11 to.

12 Q. Was that after you shot, when you saw a black object
13 come out of his hand?

14 A. It's about the time that I heard the pop.

15:50:44 15 Q. What's that?

16 A. It was about the time I heard the pop, and that's when
17 I returned fire.

18 Q. I'm asking, did you ever say that you saw a dark
19 object in his right hand come out of the shirt after the
15:50:59 20 shooting?

21 A. After the shooting?

22 Q. Mm-hmm.

23 A. I believe I said that.

24 Q. Are you sure about that?

15:51:06 25 A. Well --

1 Q. Did you ever say that you saw the dark object come out
2 of his hand -- out of his -- out of his -- from his -- on
3 his right hand, out of his shirt after the shooting, and you
4 were surprised because he was still alive?

15:51:21 5 A. I don't recall that.

6 Q. Okay.

7 MR. GILBERT: BCI Video Exhibit 7.

8 Okay. So it's 50:35 to 52:04.

9 Just before you play this, though . . .

15:52:52 10 BY MR. GILBERT:

11 Q. Do you see this image here?

12 A. Yes.

13 Q. Okay. Is that you in this image?

14 A. Yes, it is.

15:53:00 15 Q. Okay. And this was an interview that you gave to some
16 officials, right?

17 A. Yes.

18 Q. Okay.

19 MR. GILBERT: You can play it.

15:54:05 20 You need sound.

21 Why don't we forget that one for now. Okay? That's
22 all right.

23 We're having technical difficulties. We'll just pass
24 over this, Your Honor.

15:55:11 25 THE COURT: All right.

1 MR. GILBERT: All right. I want to bring you
2 to the deposition for page 55 -- page 54, lines 20 to 25,
3 and 55, line 1.

4 THE COURT: This is Exhibit . . .

15:55:49 5 MR. GILBERT: Exhibit 2.

6 Line 20 to 25.

7 BY MR. GILBERT:

8 Q. Okay. So I want to read this to you.

9 "Prior to" --

15:56:28 10 You said you saw a black object coming out of the
11 shirt with his right hand, correct?

12 Is that what you just told the jury?

13 A. When he lifted his shirt with his left hand, yes.
14 Prior to that, I didn't.

15:56:46 15 Q. That's what you said to the jury, right?

16 A. Yes.

17 Q. That you saw a black object come out of his -- out
18 under the shirt?

19 A. Yes.

15:56:53 20 Q. Okay. I'm going to read this to you.

21 "Prior to" --

22 This is a question that I asked you at your
23 deposition. This is the transcript. You were un-

24 "Prior to hearing the pop, what did you see as far as
25 that area of the shirt?

1 "Answer: It looked as if what he had under his shirt
2 he was moving back and forth, to either myself or
3 Sergeant Nicholson, or myself and the doorway.

4 "Question: But it was still under the shirt,
15:57:30 5 correct?"

6 MR. GILBERT: Next page.

7 BY MR. GILBERT:

8 Q. "Answer: That's correct.

9 " And then what happened?

10 15:57:40 "I heard the pop, and I thought I was being fired
11 upon" -- et cetera.

12 Which is true, what you told the jury before, or what
13 we see in this transcript?

14 A. It seems all the same, to me.

15 15:57:54 Q. Okay. You think it's the same, right?

16 A. Yes.

17 Q. In here, you don't say anything about any object
18 coming out of the shirt, correct?

19 A. In where? Here?

20 15:58:06 Q. In this transcript.

21 A. Initially, I didn't see anything under the shirt.

22 Q. Okay.

23 MR. GILBERT: Let's go to 55.

24 BY MR. GILBERT:

25 15:58:31 Q. Okay. You said "initially."

1 But did you ever see Brian's hand come out of his
2 shirt at any time?

3 A. I don't understand that question.

4 Q. Did you ever see his right hand come out of his shirt
15:58:43 5 at any time throughout this whole episode?

6 A. I don't recall if I seen his whole hand or not.

7 Q. I didn't say "whole hand." You said "whole hand."

8 Did you see anything coming -- did you ever see his
9 hand come out of his shirt at any time?

10 A. I don't recall.

11 Q. Okay.

12 MR. GILBERT: Page 55, line 14 and 15.

13 BY MR. GILBERT:

14 Q. "Did you ever see his hand come out of that shirt?"

15 Line 14.

16 "Answer: No.

17 "Did you ever see him point a gun at you?

18 "Just what I perceived to be a gun underneath his
19 shirt."

20 Did you read -- did you read that?

21 A. Yes.

22 Q. Okay. Thank you.

23 Mr. Frazier, you understand that police work can be
24 stressful, right?

25 A. Absolutely.

1 Q. And that stress can affect your performance in the
2 line of duty?

3 A. It certainly can, yes.

4 Q. Okay. And you have experienced stress in your life,
16:00:25 5 have you not?

6 A. Plenty of it, yes.

7 Q. And isn't it a fact that you have suffered from
8 depression in your life?

9 A. No. I wouldn't say I was ever diagnosed with
16:00:39 10 depression.

11 Q. Have you ever been on medications for any kind of
12 mental issues?

13 A. Not mental issues, no.

14 Q. Have you been under medications for anxiety?

16:00:50 15 A. No. I've been on medication, but not for those
16 things.

17 Q. What kind of medications have you been on?

18 A. The only thing that I took was -- I can't think of the
19 name of it -- Pristiq, I believe, was the name of it.

20 Q. Have you ever taken Lexapro?

21 A. A long time ago.

22 Q. Have you ever taken Viibryd?

23 A. I don't know what that is.

24 Q. 40 milligrams from Dr. Adkins?

25 A. What is Viibryd?

1 Q. I'm just asking you. It's in a Fitness for Duty
2 Evaluation.

3 A. I don't know what that is.

4 Q. Were you ever ordered to get a fitness -- to a
16:01:41 5 psychologist for a Fitness of Duty Evaluation?

6 A. Yes, I was.

7 Q. Are you on medications right now?

8 A. I'm on a ton of medication right now.

9 Q. Anything for -- anything for -- that's been prescribed
16:02:00 10 for any kind of nonphysical issues?

11 A. No.

12 Q. How many times have you seen a psychologist that you
13 were requested to go see in the line of duty?

14 A. From the sheriff's office?

16:02:20 15 Q. Yes.

16 A. I'm not sure what you mean by "requested."
17 Per policy or procedure or otherwise?

18 Q. Well, how many times have you seen a psychologist?

19 A. All total in my sheriff's office?

20 Q. Yes.

21 A. Six times.

22 Q. All right. And one was the result of using deadly
23 force, was it not?

24 A. Two.

25 Q. Well, one was previous to this case, correct?

1 A. Yes. Yes.

2 Q. You've had internal complaints filed against you for
3 allegations of aggressive and assaultive behavior; is that
4 correct?

16:02:59 5 A. That is correct, yes.

6 Q. Okay. Do you remember the complaint from a guy named
7 Randy Walters from 2012?

8 A. The name doesn't ring a bell.

9 Q. It involved a call where a citizen was having an
10 argument with some cable people, and you showed up at his
11 house.

12 Do you remember that?

13 A. No, I can't say that I do.

14 Q. Do you remember -- well, you don't remember a claim
15 that you went up the driveway, you drew your weapon, you
16 walked up to his window, stuck it in the screen window, and
17 you said, Open the fucking door, Walters, or I'll fucking
18 kill you?

19 A. I don't recall any of that.

20 Q. He also claims you kicked in the door. He had his
21 hands up, you grabbed him by the wrist, and you put your gun
22 to his temple, handcuffed him, and slammed his face into the
23 floor.

24 Do you recall that allegation?

25 Q. A. I don't recall that allegation at all.

1 Q. Do you remember the Zachary Ball complaint?

2 A. I do remember that, yes.

3 Q. That was August 13, 2013.

4 A. Yes.

16:04:32 5 Q. He said that you came to his house because of some
6 argument, and you threw him to the floor, and you handcuffed
7 him to a chair.

8 A. He said a lot more than that.

9 Q. Well -- and you never even made a report of this,
16:04:51 10 right?

11 A. There was nothing to report.

12 Q. Did you handcuff him?

13 A. Yes, I did.

14 Q. And that's a police function, right?

16:04:59 15 A. Yes, it is.

16 Q. And police are supposed to make reports when they
17 arrest somebody, right?

18 A. He wasn't under arrest.

19 Q. He was restrained of his liberty, was he not?

16:05:10 20 A. He was being detained for his aggressive behavior.

21 Q. And you made a -- you made a call -- you went to his
22 house, right?

23 A. That's correct, yeah.

24 Q. It was a police function, was it not?

16:05:21 25 A. Yes.

1 Q. And you never put it in a log or any kind of statement
2 or report of an incident?

3 A. The call was for a civil standby. We don't do reports
4 for those.

16:05:35 5 Q. When you handcuff somebody, is that not an incident?

6 A. It's not an incident that we do a report for. He was
7 not placed under arrest.

8 Q. And you were -- and you were investigated for that,
9 right?

16:05:46 10 A. That's correct.

11 Q. And were you -- were you disciplined for that?

12 A. Yes.

13 Q. So your department did not like what you did, did
14 they?

16:05:57 15 A. They didn't discipline me for the allegations.

16 Q. Because you didn't report it, right?

17 A. No. Because it was investigated, and they found out
18 that I didn't do it.

19 Q. Okay. Do you have a habit of going and taking police
16:06:12 20 action and not making a record of it?

21 A. Not at all.

22 Q. But you did in this case?

23 A. That's not true.

24 Q. You didn't report it.

16:06:19 25 A. There was nothing to report.

1 Q. Handcuffing somebody is nothing to report?

2 A. It happens every day.

3 Q. Hold on a second.

4 Okay. So I want to ask you about what your -- about
16:06:38 5 the situation at a meeting on May 14th, at the sheriff's
6 department's office.

7 You made a complaint that -- you had a K9 dog,
8 correct?

9 A. Three of them, yes.

10 Q. And they decided to take away your K9 dog because it
11 needed more training, correct?

12 A. Per my request, yes.

13 Q. And there was a meeting about that because you were
14 upset about it, right?

15 A. Very, yes.

16 Q. And there was a meeting with Captain Bosko,
17 Lieutenant Zehner, Sergeant Sweat, Sergeant Gunder, and
18 yourself, right?

19 A. That is correct, yes.

20 Q. And they came up with an action plan going forward,
21 after which the dog would be returned, right?

22 A. Yes.

23 Q. And you didn't -- you didn't agree with that, correct?

24 A. No, I didn't, not at all.

25 Q. And you said in front of all of these superior

1 officers, "Fuck this and you guys, and if I can't be in the
2 K9, I'm going to find a new job."

3 A. I don't know if that's verbatim, but it was close to
4 that.

16:07:48 5 Q. Close to it, right?

6 A. It was close to that.

7 Q. And you complained that the administration took away
8 your SWAT privileges.

9 Now, they were taking away your dog, right?

16:08:04 10 A. Correct.

11 Q. And you weren't happy with that.

12 And you said that you no longer trusted or respected
13 the administration.

14 A. True.

16:08:12 15 Q. Do you remember that?

16 A. Certain ones, yes.

17 Q. And then they told you that you had to change your
18 vehicles, right?

19 A. Yes.

16:08:20 20 Q. And you said you didn't want to drive that piece of
21 shit, right?

22 A. I don't recall that, but if that's there, I said it,
23 yes.

24 Q. Okay. And then you started crying. And they had to
16:08:34 25 try to calm you down and try to make you -- and try to get

1 you to be patient.

2 A. That's not true.

3 Q. You didn't cry?

4 A. I did cry, but nobody had to calm me down. It doesn't
16:08:45 5 say that.

6 Q. And you said, "What kind of cold-hearted individuals
7 would do this to a person? I'm already having personal
8 problems, and now they go do this to me. I tell you right
9 now, Zehner is the fucking problem, and the rest of them
16:09:02 10 should have stayed at the Mansfield Police Department. I
11 should never have come to work here."

12 A. Those are my --

13 Q. Do you remember that?

14 A. Those are my exact words.

16:09:07 15 Q. Okay. In quotes.

16 Is that the kind of behavior an officer should display
17 in front of his supervisors?

18 A. Not necessarily.

19 Q. Not necessarily.

20 And then you said they were going to come to your
21 house and pick up stuff that -- from you that they needed,
22 right?

23 A. Yeah. Anytime they take your dog, they need all of
24 his equipment.

25 Q. And you said, "I don't want any of these assholes at

1 my house"?

2 A. Absolutely.

3 Q. Okay. And then you were placed on administrative
4 leave for your behavior; is that correct?

16:09:43 5 A. That's correct, I was.

6 Q. And this is only -- this is in the summer of 2013,
7 correct?

8 A. I don't recall when it was, but if that's what you say
9 it is, yeah.

16:09:54 10 Q. Did you ever see the Fitness for Duty Evaluation by
11 Aaron Becker?

12 A. Yes.

13 Q. Okay.

14 MR. GILBERT: Can you . . .

16:10:14 15 BY MR. GILBERT:

16 Q. And you went there to see him on July -- on
17 June 7th, 2003?

18 A. I don't recall the date.

19 Q. That's around the date, right?

16:10:23 20 A. Sure. Yes.

21 Q. Did you tell -- is it Dr. Becker?

22 A. Dr. Aaron Becker, yes.

23 Q. Did you tell Dr. Becker that you denied making any
24 statements in anger in any way derogatory toward any other
16:10:51 25 officer or administration during these events?

1 A. Are you asking me if I denied that?

2 Q. Yes.

3 A. I don't recall denying it.

4 Q. Well, he says that in his statement.

16:11:01 5 Do you have any dispute about that?

6 A. Yeah, I do. Because he would investigate that through
7 my administration, and that would be brought out anyway. So
8 there wouldn't be any reason for me to say that.

9 MR. GILBERT: Your Honor, can I approach
16:11:14 10 the . . .

11 THE COURT: You may.

12 BY MR. GILBERT:

13 Q. Right here.

14 A. I don't know why he would type that, because he would
16:11:26 15 have to talk to my administration the next day about it.

16 Q. All right. Well, he put it in the report.

17 Also, it also says here that "Mr. Frazier has been
18 diagnosed with mild depression and anxiety by his primary
19 care physician, Dr. Adkins.

20 A. I never gave him any of that information. I told him
21 about being on the medicine.

22 Q. So is he lying about that?

23 A. I'm not going to call the man a liar.

24 Q. And this is the -- did you challenge this report when
16:12:10 25 it went to the high-ranking sheriff officials?

1 A. I'm not allowed to see those. I've never read that
2 report.

3 Q. Okay. Did you admit to Dr. Becker that you sometimes
4 come off as cocky?

16:12:37 5 A. Sure. Yeah.

6 Q. At least that, you agree with me, right?

7 A. I'll agree with that, yeah.

8 Q. Okay. He also puts in there that you admitted that
9 "His intensity of expression is likely higher than need,
16:13:00 10 being when his emotions are high."

11 A. I don't know what that means.

12 Q. Okay. You also -- he also said that, "He recognizes
13 that he has little patience and low frustration tolerance."

14 A. Sometimes, yes.

16:13:16 15 Q. Okay. Well, that meeting kind of showed that, right?

16 A. Certain situations, certainly.

17 Q. That's not good for policing, is it? That kind of
18 attitude, is it?

19 A. I don't demonstrate it towards the public.

20 Q. All right. And then he says here that you recognize
21 the need to develop more patience, and "He understands that
22 his emotions become intense and excited, both good and bad."

23 A. I've needed to practice patience all my life.

24 Q. Okay. "Sometimes this leads him" -- I'm quoting.
16:13:57 25 "Sometimes this leads him to coming off as an

1 asshole."

2 And then he goes on to say, "He has learned to back
3 off certain situations, call for another officer to deal
4 with the suspect."

16:14:14 5 A. That's correct, yes.

6 Q. Okay. That would have been good advice when you
7 went -- when you didn't back off, and ran into the room
8 where Brian Garber was on the bed, right?

9 A. I don't --

16:14:29 10 Q. You could have left it to the other two to deal with,
11 right?

12 A. I don't know how to answer that.

13 Q. Okay. And Captain Bosko, who is Captain Bosko?

14 A. He's a retired captain that we had back then.

16:14:53 15 Q. Back in 2013, he was there?

16 A. Yeah.

17 Q. Okay. And he -- in the report, Dr. Becker says that
18 he talked to Bosko, he interviewed Bosko, and "Bosko
19 described Mr. Frazier as a hothead who responded negatively
20 to removal of his K9 from his position to be reassessed."

21 And it goes on and talks about that you are "sometimes
22 viewed as unbelievable, and is thought to exaggerate,
23 manipulate, and has been caught in false statements."

24 A. You'd have to understand my relationship with
25 Captain Bosko.

1 Q. Okay. So you have a problem with Zehner. You have a
2 problem with Bosko.

3 Who else do you have a problem with over there?

4 A. No one.

16:15:59 5 Q. Those are the only two?

6 A. Yeah.

7 Q. Okay.

8 A. The other one left and went --

9 Q. Okay. So you disagree with your superior officer when
16:16:09 10 he said that you are sometimes viewed as unbelievable,
exaggerate, manipulate, and has been caught in false
11 statements?

12 A. I strongly disagree with that.

13 Q. And do you recall that what the -- what the
16:16:33 15 recommendations were by Dr. Becker?

16 A. No. I've never had an opportunity to see that report,
17 so I don't know.

18 Q. Okay. And he had said, "Therefore, it is strongly
19 recommended that he seek mental health intervention to learn
16:16:52 20 some more appropriate coping, interpersonal, self-control,
21 and patience skills."

22 A. If he said that, it was never brought to my attention.

23 Q. So they never brought that to your attention?

24 A. No, sir.

16:17:08 25 Q. Okay. So this situation in May of 2013, was about

1 nine or ten months before you shot and killed Brian Garber.

2 A. Which situation?

3 Q. This situation where you blew up in the situation, and
4 had to get fitness for duty clearance.

16:17:41 5 A. What's your question?

6 Q. Okay. This happened -- this incident where you blew
7 up over the K9 had happened about nine or ten months before
8 the Garber incident, right?

9 A. Yes.

16:18:00 10 Q. Okay.

11 MR. GILBERT: No further questions.

12 THE WITNESS: Okay.

13 MR. GILBERT: One moment. Let me just talk
14 to -- okay?

16:18:05 15 No further questions.

16 THE COURT: And you are reserving further
17 examination until your case in chief?

18 MS. WILLIAMSON: That's correct, Your Honor.

19 MR. GILBERT: Thank you, Your Honor.

16:18:16 20 THE COURT: Do you have another witness?

21 MS. GREENE: Yes, Judge.

22 The plaintiff would call Andrew Knee, if the Court
23 deems it a good time.

24 THE COURT: This is -- we're not going to be
16:18:30 25 able to finish this today, I take it.

1 MS. GREENE: I think that we could -- yeah, I
2 think that we could get . . .

3 THE COURT: We could get --

4 MS. GREENE: I'm sorry, Judge. Just one
16:19:05 5 moment, please.

6 THE COURT: All right.

7 MS. GREENE: Judge, I believe that we could
8 get through his testimony probably right around 5:00, or
9 shortly thereafter.

10 THE COURT: All right. Then let's try to do
11 that.

12 Call your next witness.

13 MS. GREENE: Thank you.

14 The plaintiffs would call Deputy Andrew Knee.

16:20:25 15 THE COURT: When I said previously, if there's
16 anything we can do to make you comfortable, please let us
17 know -- it's very difficult, I know, to have the sun shining
18 in your eyes.

19 A JUROR: Turn on the heat.

16:21:38 20 THE COURT: They're bringing him in --

21 MS. GREENE: I believe he's returning from the
22 restroom.

23 THE COURT: Oh, okay.

24 MS. GREENE: He should be here shortly.

16:21:44 25 THE COURT: All right. Fine.

1 Mr. Kurdziel, are you all right?

2 Do you want some more shade?

3 MR. KURDZIEL: Let the sun shine in, Judge.

4 THE COURT: All right.

5 DEPUTY CLERK: Do you solemnly swear or affirm
6 that your testimony in this case will be the truth, the
7 whole truth, and nothing but the truth, so help you God?

8 THE WITNESS: Yes, I do.

9 CROSS-EXAMINATION OF ANDREW KNEE

16:24:48 10 BY MS. GREENE:

11 Q. Good afternoon, Deputy Knee.

12 My name is Jacqueline Greene, and I'm one of the
13 attorneys representing the estate of Brian Garber.

14 Will you please state your name for the record.

16:24:56 15 A. Yes. It's Deputy Andrew Knee.

16 Q. And you joined the Richland County Sheriff's Office in
17 February of 2014, correct?

18 A. Yes, that's correct.

19 Q. And that's approximately one month prior to the
20 shooting of Brian Garber, right?

21 A. That's correct.

22 Q. And how many years of prior law enforcement experience
23 did you have before joining the RCSO?

24 A. I was a full-time officer with the Galion Police
25 Department for four years prior to that, and I was an

1 auxiliary officer with the Lexington Police Department for
2 two years prior to that.

3 Q. I'd like to go over some of the important details of
4 the shooting that killed Brian Garber on March 16, 2014.

16:25:30 5 On that date, you and Lieutenant Donald Zehner were on
6 duty together, correct?

7 A. That's correct.

8 Q. And earlier in the evening, you and Lieutenant Zehner
9 had responded to a call concerning someone who entered into
16:25:42 10 a residence and was engaging in a physical altercation with
11 the people inside, correct?

12 A. That's correct.

13 Q. And that was at 3425 Mill Run Road, in Lexington,
14 Ohio?

16:25:55 15 A. Yes, it was.

16 MS. GREENE: I'd like to show the witness
17 Exhibit 29-6, please.

18 BY MS. GREENE:

19 Q. And, Deputy Knee, this exhibit, 29-6, shows the house
20 at 3425 Mill Run Road, correct?

21 A. Correct.

22 MS. GREENE: Your Honor, permission to publish
23 to the jury?

24 THE COURT: No objection?

16:26:21 25 MS. WILLIAMSON: No objection.

1 THE COURT: You may publish.

2 BY MS. GREENE:

3 Q. All right. So when you arrived at this house, you
4 spoke there with Connie Garber and Sara Knowlton, right?

16:26:31 5 A. Yes, that's correct.

6 Q. And during your conversation with them,
7 Lieutenant Zehner was present at the house, but not handling
8 the call?

9 A. Correct.

10 Q. And you were taking the lead?

11 A. Yes.

12 Q. And by the time you arrived at that house,
13 Brian Garber had already left the home, correct?

14 A. That's correct.

15 Q. You learned while you were there that this was the
16 home that Brian Garber and Sara Knowlton shared, correct?

17 A. Yes.

18 Q. And that they were married?

19 A. Correct.

20 Q. You also learned that Connie was Brian's mother?

21 A. Yes, I did.

22 Q. And you were told that Connie wanted Brian to spend
23 the night at her house that night?

24 A. I was told she wanted him to stay with her that
16:27:06 25 afternoon.

1 Q. You were also told that Sara had already placed
2 Brian's clothing and medications outside the house before he
3 had arrived home from work so he could pick them up, right?

4 A. Correct.

16:27:17 5 Q. And you were told that Brian came upset because Sara
6 was not allowing him into the house, right?

7 A. Correct.

8 Q. And that he'd kicked the door in?

9 A. Correct.

16:27:25 10 Q. And he entered the home?

11 A. Correct.

12 Q. Connie and Sara reported to you that Brian had had
13 physical contact with each of them, right?

14 A. Correct.

16:27:32 15 Q. And Sara said that she pushed -- or he pushed her down
16 on the bed?

17 A. She advised that she was thrown down and strangled, is
18 what I was told.

19 Q. And she said that his hands were in the area of her
20 collarbone, neck area, correct?

21 A. I don't remember the exact placement that she said,
22 just that she was thrown down and strangled.

23 Q. And he reported to you that Connie intervened in that
24 situation?

16:27:54 25 A. Correct.

1 Q. And then Brian pounded her on her left arm and chest
2 area?

3 A. Correct.

4 Q. So when you were conducting this interview with Connie
16:28:01 5 and Sara, they were both calm at that point, though,
6 correct?

7 A. Correct.

8 Q. They weren't -- they were talking in a normal,
9 conversational voice?

16:28:09 10 A. Yes.

11 Q. And they weren't crying, were they?

12 A. Not that I remember.

13 Q. And they were not frantic, right?

14 A. No.

16:28:17 15 Q. They made you -- or they made you aware while you were
16 there that Brian was on medication, right?

17 A. All I remember for sure is that I was told he'd had
18 medications placed outside for him.

19 Q. Okay. Well, you knew that Sara and Connie called 911
16:28:33 20 because they wanted Brian to get help for his state of mind,
21 right?

22 A. They wanted to get him help, yes.

23 Q. And while you were there, you asked Connie and Sara to
24 fill out domestic violence packets?

16:28:43 25 A. Correct.

1 Q. They did not ask for those packets, though, did they?

2 A. I don't believe so.

3 Q. And you brought out the packets and asked them to fill
4 them out?

16:28:51 5 A. Correct.

6 Q. And after filling out those packets, that would allow
7 you to arrest and charge Brian with domestic violence,
8 right?

9 A. Correct.

10 Q. Connie did express hesitation to you about signing the
11 packet, though, correct?

12 A. Correct.

13 Q. On that day, you were aware that the Richland County
14 Sheriff's Office has emergency resources available to people
15 with mental health crisis, right?

16 A. Correct.

17 Q. And one of those resources available to a police
18 officer in this kind of situation is pink slipping?

19 A. Correct.

20 Q. And "pink slipping" is a term used to describe when
21 police take a person to a hospital for evaluation or
22 treatment rather than taking them to jail, right?

23 A. Correct.

24 Q. And pink slipping can be done, even if a person has
25 committed a criminal act, right?

1 A. Correct.

2 Q. And if a person is a danger to themselves or to other
3 people, this can be an appropriate situation to pink slip
4 them?

16:29:44 5 A. It can be.

6 Q. While you were at the house, you also advised Connie
7 and Sara about the existence of what's called Mental Health
8 Court, right?

9 A. Correct.

10 Q. And Mental Health Court is a special court where
11 criminal charges are met with interventions involving mental
12 health assessments and treatment plans, right?

13 A. Correct.

14 Q. As well as court-based monitoring of progress on those
15 treatment plans?

16 A. That would be correct.

17 Q. And the goal there is to provide community-based
18 treatment instead of jail time, where possible, right?

19 A. I would believe so, yes.

20 Q. So while you and Lieutenant Zehner were at the house,
21 other deputies were out looking for Brian Garber, right?

22 A. That's correct.

23 Q. And when you concluded at 3425 Mill Run Road with Sara
24 and Connie, you and Lieutenant Zehner left?

25 A. Correct.

1 Q. You were done with the situation at that point?

2 A. Yes.

3 Q. Okay. So it's true, though, that as you were some
4 distance, driving away from that home, you heard over the
16:30:42 5 radio that Brian had been found?

6 A. Yes, that's correct.

7 Q. And you heard that he possibly had a 10-10?

8 A. Correct.

9 Q. And a "10-10" means firearm, right?

16:30:53 10 A. Correct.

11 Q. No one at the 3425 Mill Run Road house ever mentioned
12 a firearm to you at any time, did they?

13 A. Not on an initial call, no.

14 Q. Okay. And radio said it was unknown if he actually
16:31:05 15 had a gun?

16 A. I don't remember the exact radio traffic, just that he
17 had returned and possibly had a firearm.

18 Q. So just "possibly had a firearm," right?

19 You didn't know for sure at the time?

16:31:15 20 A. Correct.

21 Q. Okay. So you then turn your police cruiser around and
22 headed back to Mill Run Road?

23 A. Correct.

24 Q. And Sergeant James Nicholson arrived in the area
16:31:26 25 approximately the same time as you?

1 A. Correct.

2 Q. Along with other officers from the Lexington police?

3 A. Correct.

4 Q. And you then learned that Brian was actually across
16:31:34 5 the street at his parents' house at 3400 Mill Run Road,
6 right?

7 A. That's correct.

8 MS. GREENE: If I could, show the witness,
9 please, Exhibit 29-5.

10 BY MS. GREENE:

11 Q. This photo in Exhibit 29-5 shows the house at 3400
12 Mill Run Road, right?

13 A. Yes, it does.

14 MS. GREENE: Your Honor, permission to publish
16:32:01 15 to the jury?

16 THE COURT: No objection.

17 MS. WILLIAMSON: No objection.

18 THE COURT: You may publish.

19 BY MS. GREENE:

20 Q. Okay. So you parked your cruiser near this house, and
21 then exited the vehicle?

22 A. That's correct.

23 Q. And Lieutenant Zehner told you to follow right behind
24 Sergeant Nicholson?

25 A. Correct.

1 Q. And you followed Sergeant Nicholson into the garage,
2 and then into the house, right?

3 A. Correct.

4 MS. GREENE: If I could, show the witness,
16:32:22 5 please, Exhibit 29-2.

6 BY MS. GREENE:

7 Q. Is this the garage you entered through?

8 A. Yes, it is.

9 Q. Okay.

10 MS. GREENE: Permission to publish to the
11 jury, Your Honor?

12 MS. WILLIAMSON: No objections.

13 THE COURT: You may publish.

14 BY MS. GREENE:

15 Q. Okay. So you went through the door in this
16 garage -- let's see -- right over here, right?

17 A. That's correct.

18 Q. Okay. And Defendant Frazier arrived at some point
19 after you, right?

20 A. Correct.

21 Q. And you know that he followed you into the house,
22 correct?

23 A. Correct.

24 Q. Did you know if he was directly behind you at the
16:33:13 25 time?

1 A. I knew that him and Lieutenant Zehner were both behind
2 me. As to what order they were in at the time, I'm not
3 certain because I didn't look over my shoulder.

4 Q. When he arrived, you didn't have any conversation with
16:33:25 5 Defendant Frazier, did you?

6 A. No.

7 Q. But you did say that Lieutenant Zehner and
8 Defendant Frazier entered the home behind you?

9 A. That's correct.

10 Q. And so you followed Sergeant Nicholson to the stairs?

11 A. That's correct.

12 Q. And then up to the second floor?

13 A. That's correct.

14 Q. Okay. And at the top of the stairs, you looked -- you
16:33:48 15 looked down the hallway, correct?

16 A. Correct.

17 MS. GREENE: Can I please bring up
18 Exhibit 27-4 for the witness.

19 BY MS. GREENE:

20 Q. Is this the hallway that you looked down?

21 A. Yes.

22 Q. Okay. At the time that you were looking down the
23 hallway, the lights were on, correct?

24 A. Yes.

16:34:16 25 MS. GREENE: Your Honor, permission to publish

1 to the jury, please.

2 THE COURT: No objection?

3 MS. WILLIAMSON: No objection.

4 THE COURT: You may publish.

16:34:25 5 BY MS. GREENE:

6 Q. Were the lights that we see in the photographs the
7 same lights that were on when you were in that hallway?

8 A. I believe so.

9 Q. Okay. And as you moved down the hallway, you looked
10 into the various rooms you were passing?

11 A. Yes, that's correct.

12 Q. And in this photo, we see two doors on the left and
13 one door on the right, correct?

14 A. Correct.

16:34:43 15 Q. Did you look into each of them?

16 A. I would have looked into the rooms on the left and the
17 right that come first. I don't remember looking into the
18 room on the right once we got there.

19 Q. Okay. You continued down the hallway, looking into
20 those rooms.

21 Did you see anybody in them?

22 A. No, I did not.

23 Q. Okay. And then finally, you reached the end of the
24 hallway?

16:35:09 25 A. Correct.

1 Q. And when you got there, did you look into the bedroom
2 on the left?

3 A. Correct.

4 Q. And did you have your firearm drawn at this time?

16:35:20 5 A. Yes, I did.

6 Q. When did you first draw your firearm?

7 A. I had it out as I came in the house.

8 Q. And what firearm were you carrying?

9 A. My duty-issued firearm.

10 Q. And when you reached that bedroom, the last door on
11 the left, you saw Brian Garber inside, correct?

12 A. Correct.

13 Q. He was sitting on his bed, right?

14 A. Correct.

15 Q. And his back was against the headboard?

16 A. Correct.

17 Q. His legs were extended in front of him?

18 A. Correct.

19 Q. And the bed was located in the back corner of that
20 bedroom, the corner opposite the doorway, correct?

21 A. Correct.

22 Q. And when you got there, Sergeant Nicholson positioned
23 himself on the right side of the doorway?

24 A. Correct.

25 Q. And you positioned yourself on the left side of the

1 doorway?

2 A. Correct.

3 Q. Your bodies, were they inside or outside the doorway
4 to that room?

16:36:08 5 Meaning, were you still in the hallway at that time?

6 A. My body was in the hallway. My right arm was through
7 the door.

8 Q. Okay.

9 MS. GREENE: I'd like to show the exhibit,
16:36:20 10 please -- or show the witness Exhibit 27-10, please.

11 BY MS. GREENE:

12 Q. Does this photograph in Exhibit 27-10 show the doorway
13 where you and Sergeant Nicholson positioned yourself?

14 A. Yes, it does.

15 Q. And this photo shows the doorway from the inside of
16 the bedroom, right?

17 A. Yes, it does.

18 MS. GREENE: Your Honor, permission to publish
19 to the jury, please.

20 THE COURT: No objection.

21 MS. WILLIAMSON: No objection.

22 THE COURT: You may publish.

23 BY MS. GREENE:

24 Q. Okay. So looking at this photograph, then, since
16:36:53 25 we're inside the room, Nicholson would have been on the side

1 nearest that dresser, right?

2 A. Correct.

3 Q. And you would have been on the side closest to, I

4 guess, the door hinges?

16:37:01 5 A. Correct.

6 Q. Okay. And we also see the foot of the bed there in

7 the corner, right?

8 A. Yes, we do.

9 Q. So by positioning yourselves at the left side of the
16:37:12 10 doorway, were you taking cover?

11 A. Yes.

12 Q. You chose not to enter the room for potential safety
13 reasons, right?

14 A. That's correct.

16:37:19 15 Q. Sergeant Nicholson also stayed outside the room?

16 A. That's correct.

17 Q. When you first saw Brian, you heard him say, I've got
18 a gun; is that correct?

19 A. Yes, that's correct.

16:37:34 20 Q. But Brian did not say, Leave or I'll shoot, right?

21 A. No.

22 Q. He did not verbally threaten you?

23 A. No.

24 Q. And at the point that you positioned yourself at the
16:37:44 25 doorway, Defendant Frazier steps between you and

1 Sergeant Nicholson, right?

2 A. Correct.

3 Q. Did he make any physical contact with your body when
4 he did that?

16:37:54 5 A. With me?

6 Q. Yes.

7 A. No.

8 Q. Okay. So he stepped between you and went into the
9 bedroom, into a position directly in front of Brian Garber,
10 right?

11 A. Correct.

12 Q. Was he fully inside of that bedroom at that time?

13 A. Yes.

14 Q. You were surprised that he entered the room, weren't
15 you?

16 A. Yes.

17 Q. At that point, everybody in their positions, you and
18 Nicholson at the door and Frazier in the room, you proceeded
19 to keep a line of sight on Brian Garber, correct?

20 A. Correct.

21 Q. But you did not personally speak to Brian or converse
22 with him in any way?

23 A. No.

24 Q. At that point, you heard Sergeant Nicholson begin to
25 give orders to show hands and things to that effect, right?

1 A. Correct.

2 Q. And then you heard Nicholson begin having conversation
3 with Brian, right?

4 A. Correct.

16:38:46 5 Q. And he was saying things like, It doesn't have to be
6 like that. We all have families?

7 A. That's correct.

8 Q. And from where you were standing, you were able to see
9 Brian on the bed from that vantage point?

16:38:57 10 A. Correct.

11 Q. His left hand was down by his side at the time, right?

12 A. Correct.

13 Q. You could not see his right hand, though?

14 A. No.

16:39:05 15 Q. And you claim that you saw a shape under his shirt,
16 right?

17 A. Yes, I did.

18 Q. What shape was that?

19 A. It was a distinct rectangular shape.

16:39:16 20 Q. But you couldn't exactly make out what it was, could
21 you?

22 A. No.

23 Q. Can you demonstrated for us the size of the impression
24 that you saw?

16:39:26 25 A. About yea wide, yea thick.

1 Q. It looks like you're showing something several inches
2 long and, maybe, an inch and a half or so thick; is that
3 right?

4 A. Yes, approximately.

16:39:38 5 Q. Okay. Did Brian move that object around?

6 A. Not that I was able to notice.

7 Q. You saw that it was just stationary?

8 A. From my perspective, yes.

9 Q. And you did not see anything in Brian's exposed left
16:39:54 10 hand, correct?

11 A. No.

12 Q. I would like to show you Plaintiff's Exhibit 42.

13 MS. GREENE: And if we could, pull up the
14 perspective from the left side of the doorway.

16:40:33 15 We'd like to show this to the witness, please.

16 BY MS. GREENE:

17 Q. Okay. Deputy Knee, you're looking at an illustration
18 right now, right?

19 A. Correct.

16:40:45 20 Q. Does this illustration depict your approximate
21 perspective into the room where Brian was located?

22 A. My positioning in this photo is not accurate.

23 Q. Well, tell me what the inaccuracy is.

24 A. My body in this -- when I was positioned here, was
16:40:59 25 completely flat against this wall that you have me leaning

1 up against, with my left hand out like this, whole arm
2 flattened against the wall. Had my entire body pressed up
3 against the wall with just enough for my head around the
4 frame.

16:41:14 5 And I could see him and my right arm completely
6 through the doorway.

7 Q. Okay. Well, when you look at the inset illustration,
8 where it shows the view into the room --

9 Do you see that there?

16:41:25 10 A. Yes.

11 Q. -- is that view into the room approximately what you
12 saw from the doorway, as far as the positioning?

13 A. That's approximately what I saw, yes.

14 Q. Okay. Thank you.

16:41:34 15 At that point in time, while Sergeant Nicholson was
16 conversing with Brian, you were not yet ready to shoot, were
17 you?

18 A. No.

19 Q. And your decision to hold fire was based on the deadly
20 force training you'd received from the academy and various
21 police departments, right?

22 A. Correct.

23 Q. And you're trained that the use of deadly force is
24 supposed to be the last resort, right?

16:42:03 25 THE REPORTER: Can you slow down.

1 MS. GREENE: Sure. Sorry.

2 I'm a little too fast. Sorry about that.

3 BY MS. GREENE:

4 Q. And you're trained that the use of deadly force is
16:42:03 5 supposed to be the last resort, right?

6 A. It would be, yes.

7 Q. And the Richland County Sheriff's Office policies
8 require that an officer may only use deadly force to defend
9 himself or another person when they reasonably believe that
16:42:18 10 there is an imminent threat of death or serious physical
11 harm, right?

12 A. Correct.

13 Q. And you agree that you have a duty to comply with
14 Richland County Sheriff's Office policies as a deputy,
16:42:34 15 right?

16 A. Yes, I do.

17 Q. And you agree with me that police officers have a duty
18 to follow the law, right?

19 A. Yes, I do.

16:42:39 20 Q. And that includes a duty to comply with the
21 Constitution?

22 A. Yes.

23 Q. And police should not abuse their authority, right?

24 A. No.

16:42:48 25 Q. So turning back to the events in the room,

1 Sergeant Nicholson continued conversing with Brian, right?

2 A. Correct.

3 Q. And that conversation went on for about one minute?

4 A. Approximately.

16:43:00 5 Q. And you were watching Brian closely at the time so you
6 could react quickly if the situation changed, right?

7 A. That's correct.

8 Q. And at the time while Sergeant Nicholson was talking
9 to him, Brian was sitting on the bed, right?

16:43:15 10 A. Correct.

11 Q. And you were watching him?

12 A. Correct.

13 Q. And at that time, Brian was not presenting an
14 immediate threat requiring you to use deadly force, right?

16:43:25 15 A. We could have used force at that point in time, yes.
16 We chose not to, though.

17 Q. Well, you weren't shooting, though, right?

18 A. That's correct.

19 Q. And wouldn't you use deadly force when you needed to
20 use deadly force to protect yourself?

21 A. You would.

22 Q. And then after that one-minute mark or so, you claim
23 you heard a bang, right?

24 A. That's correct.

16:43:48 25 Q. And that bang sounded like a gunshot to you?

1 A. Yes, it did.

2 Q. And you thought -- you claim that you thought that
3 bang sound came from Brian Garber's area, right?

4 A. That's correct.

16:44:01 5 Q. Now, you're a certified firearms instructor, right?

6 A. That's correct.

7 Q. And in your experience as a firearms instructor, all
8 guns emit a flash when they're fired, correct?

9 A. Correct.

16:44:14 10 Q. What does a muzzle flash look like?

11 A. It looks like a bright flash of light.

12 Q. And you did not see any muzzle flash when you heard
13 that bang in the bedroom, did you?

14 A. That's correct.

16:44:28 15 Q. And you were looking at Brian Garber at the time that
16 you heard the bang, right?

17 A. That's correct.

18 Q. So there were no muzzle flash in Brian's area?

19 A. No.

16:44:36 20 Q. And when you heard that bang, you did not see
21 Brian Garber move, correct?

22 A. No.

23 Q. And your focus had been on Brian the entire time?

24 A. That's correct.

16:44:47 25 Q. You did not divert your attention to look anywhere

1 else during this period, right?

2 A. No, I did not.

3 Q. And you were looking directly at him when you heard
4 the bang?

16:44:56 5 A. Yes.

6 Q. And immediately after hearing this bang, you fired
7 your gun at Brian Garber, right?

8 A. I did return fire after that.

9 Q. You heard Raymond Frazier, Raymond Jeffrey Frazier,
10 begin firing shots at Brian Garber before you pulled your
11 trigger, right?

12 A. Correct.

13 Q. And all three of you, Jeff Frazier,
14 Sergeant Nicholson, and you, you all shot at Brian Garber,
15 right?

16 A. Correct.

17 Q. And the reason you shot at Brian Garber was because
18 you heard the bang, right?

19 A. That's correct.

20 Q. And that's the bang you thought was a gunshot?

21 A. Yes.

22 Q. And until that point, you were not in a situation
23 where you believed you needed to use deadly force, correct?

24 A. I was not in a situation where I believed I wanted to
25 before that. As I stated before, I could have used it

1 before.

2 Q. All right.

3 MS. GREENE: Well, if we could, please show
4 the witness Exhibit 15.

16:45:56 5 BY MS. GREENE:

6 Q. You were deposed in this case previously, right?

7 A. Yes, ma'am.

8 Q. And you testified under oath in that proceeding?

9 A. Yes.

16:46:03 10 MS. GREENE: If we could, go, please, to
11 page 63, lines 9 through 11.

12 BY MS. GREENE:

13 Q. So you see here that in your deposition, you were
14 asked the question at line 9.

16:46:22 15 "Right. Up to that point, you were not in a situation
16 where you believed you needed to use deadly force, correct?

17 "Answer: Not immediately."

18 Do you see there?

19 A. Yes, I do.

16:46:34 20 Q. So it was your testimony at one point, that at that
21 time, you did not need to use deadly force, right?

22 A. I did not want to at that point, yes.

23 Q. Okay. Do you know how many shots you fired?

24 A. At that particular point in time, no.

16:46:48 25 Q. Do you know now how many shots you fired?

1 A. I looked afterwards. I believe it was three.

2 Q. You never saw Brian Garber's hand, his right hand,
3 come out of his shirt, and point an object in your direction
4 prior to firing at him, did you?

16:47:04 5 A. No, I did not.

6 Q. In fact, you never saw any object in Brian Garber's
7 hand, outside of his shirt, prior to firing at him, did you?

8 A. Not outside of his shirt.

9 Q. And you never saw him pull up his shirt, did you?

16:47:17 10 A. No.

11 Q. You never saw him lean forward and extend his right
12 hand?

13 A. No.

14 Q. You never saw him pull out from under his shirt an
15 object that appeared to be a firearm?

16 A. No.

17 Q. You never saw a black object in his hand, did you?

18 A. No.

19 Q. After the shooting, you went in the bedroom, right?

16:47:36 20 A. That's correct.

21 Q. And you checked on Defendant Frazier?

22 A. Yes.

23 Q. And you kept your weapon drawn at this time, correct?

24 A. That's correct.

16:47:44 25 Q. And then you looked in Brian Garber's direction?

1 A. Yes.

2 Q. And at that time, did you see -- whatever object was
3 supposedly under his shirt as this incident unfolded, did
4 you see that object visible?

16:47:59 5 A. No, I didn't.

6 Q. Did you go over to him, and try to find this alleged
7 gun?

8 A. No.

9 Q. And did you pat him down?

16:48:05 10 A. No.

11 Q. Did Deputy Frazier try to pat him down?

12 A. No.

13 Q. Did Sergeant Nicholson try to pat him down?

14 A. Not that I saw.

16:48:14 15 Q. Did any of you look for a weapon?

16 A. No.

17 Q. You weren't thinking about looking for a weapon at
18 that point in time, were you?

19 A. Not at that point in time.

16:48:22 20 Q. Did you, Defendant Frazier, or Sergeant Nicholson
21 touch Brian at all at that point?

22 A. No.

23 Q. And when you were looking at Brian after the shooting,
24 did you see anything on the bed that looked like a gun?

16:48:37 25 A. No.

1 Q. Did you see a remote control on the bed at that time?

2 A. No.

3 MS. GREENE: If I could, please show the
4 witness Exhibit 28-11.

16:49:03 5 BY MS. GREENE:

6 Q. Okay. Did you ever see Brian's right hand come out
7 from underneath his shirt prior to the shooting?

8 A. Prior to the shooting, no.

9 Q. Did you see it come out during the shooting?

16:49:13 10 A. Not that I noticed.

11 Q. Okay. So I'm showing you Plaintiff's Exhibit 28-11.

12 Does this photo accurately represent the room and
13 Brian Garber's body on the bed, as you recall it, after the
14 shooting was over?

16:49:27 15 A. Yes.

16 MS. GREENE: Your Honor, permission to publish
17 to the jury?

18 THE COURT: Objection?

19 MS. WILLIAMSON: No objection.

16:49:33 20 THE COURT: You may publish.

21 BY MS. GREENE:

22 Q. Do you recall seeing this remote on the bed when the
23 shooting occurred?

24 The remote that's visible in this photo?

16:49:48 25 A. No, I do not.

1 Q. Do you recall seeing it on the bed when the shooting
2 was over?

3 A. No.

4 Q. A couple minutes after the shooting ended,
16:50:02 5 Deputy -- or excuse me -- Defendant Frazier told you to
6 clear the room, right?

7 A. That's correct.

8 Q. And then Sergeant Nicholson asked you to go get a
9 camera from his cruiser?

16:50:11 10 A. Yes.

11 Q. So that the scene could be photographed?

12 A. Yes, that's correct.

13 Q. And when you exited the room, Defendant Frazier was
14 still inside?

16:50:18 15 A. Yes.

16 Q. And did Sergeant Nicholson exit the room with you?

17 A. I don't remember.

18 Q. Okay. In any case, you went out and got the camera
19 from the cruiser, right?

16:50:31 20 A. That's correct.

21 Q. So you had to leave the house, and go out to a vehicle
22 outside?

23 A. Yes.

24 Q. And then you took the camera and brought it back into
16:50:38 25 the house, right?

1 A. Yes.

2 Q. And you gave it to Sergeant Nicholson?

3 A. Yes.

4 Q. Did that process -- how long did it take, of getting
16:50:45 5 the camera?

6 A. Just a couple of minutes.

7 Q. And after you gave Nicholson the camera, you went
8 downstairs to the kitchen, right?

9 A. That's correct.

10 16:50:55 MS. GREENE: If I could, please show the
11 witness Exhibit 27-1.

12 BY MS. GREENE:

13 Q. So you're looking at Exhibit 27-1.

14 Is this the kitchen that you went downstairs to?

15 16:51:17 A. Yes.

16 Q. Okay.

17 16:51:21 MS. GREENE: Permission to publish to the --
18 or sorry.

19 Permission to publish to the jury, please.

20 16:51:21 MS. WILLIAMSON: No objection.

21 THE COURT: You may publish.

22 BY MS. GREENE:

23 Q. So while you were in the kitchen, this one we see in
24 27-1, you spoke with Defendant Frazier and
16:51:33 25 Sergeant Nicholson about what happened in Brian Garber's

1 room, right?

2 A. We did talk, yes.

3 Q. And during that conversation, all three of you
4 discussed that you saw an impression under the shirt, right?

16:51:44 5 A. I don't remember all the specifics. I can just tell
6 you that we did discuss what had just happened.

7 Q. During that conversation, did Sergeant Nicholson
8 suggest that the impression looked like a Glock?

9 A. That was brought up at some point in time during the
16:51:59 10 course of this investigation. I don't remember exactly
11 when, but, yes, he did bring that up at one point.

12 Q. And a Glock is a handgun, right?

13 A. Yes, that's correct.

14 Q. And all three of you discussed the shooting later in
16:52:12 15 the same 24-hour period at a so-called critical incident
16 debrief with a union representative, right?

17 A. That's correct.

18 Q. You agree with me, though, that it's important for
19 officers involved in a shooting to not discuss the shooting
16:52:25 20 event after it happens, correct?

21 A. Yes.

22 Q. And you agree that discussing the shooting gives an
23 appearance that you're trying to make your stories match,
24 right?

16:52:36 25 A. I understand how that can look.

1 Q. So a couple of days later, though, you learned that
2 Brian Garber was actually unarmed when Defendant Frazier and
3 you and Sergeant Nicholson shot him, right?

4 A. That's correct.

16:52:52 5 Q. And you also later heard that it was not a gun inside
6 underneath Brian Garber's shirt, but instead, it was a
7 remote?

8 A. Yes.

9 MS. GREENE: If I could, please show the
16:53:03 10 witness Exhibit 27-12.

11 BY MS. GREENE:

12 Q. Have you ever seen this photo before?

13 A. I believe one similar to that was shown to me during
14 my deposition.

16:53:22 15 Q. And what is depicted in this photo?

16 A. A remote control.

17 MS. GREENE: Permission to publish to the
18 jury, please.

19 MS. WILLIAMSON: No objection.

20 THE COURT: You may publish.

21 BY MS. GREENE:

22 Q. So this is the remote that was collected into evidence
23 from Brian's bed, right?

24 A. As far as I understand, yes.

25 Q. And the remote in this photo does not look like it

1 could have been the thing under Brian's shirt, does it?

2 A. No, it does not.

3 Q. And what you saw under the shirt was smaller than this
4 remote, right?

16:53:57 5 A. Yes.

6 Q. There was no gun ever found on Brian Garber, correct?

7 A. Correct.

8 Q. And no gun was ever found in his room?

9 A. Correct.

10 Q. He was unarmed when you shot him?

11 A. Correct.

12 Q. You were not hurt at all during this shooting event,
13 correct?

14 A. No, I was not.

15 MS. GREENE: No further questions.

16 Thank you.

17 THE COURT: Any examination for the defense at
18 this time?

19 MS. WILLIAMSON: No. We'll reserve.

20 THE COURT: Officer, thank you for your
21 testimony. You may step down.

22 THE WITNESS: Thank you.

23 THE COURT: Well, Ms. Greene, your estimate
24 was accurate; we're at 4:54.

25 So at this time, we're going to adjourn for the day.

1 I admonish the jury, once again, not to discuss the
2 case, not to communicate with this case about anyone, not to
3 do any research on the Internet, not to communicate with
4 anyone about this case on the Internet. And all the other
16:55:32 5 admonitions that I gave you remain in full force and effect
6 for the end of the trial.

7 I thank you for your service, and thank you for your
8 patience and your attention today.

9 And we are adjourned -- we are in recess until
16:55:46 10 9:00 a.m. tomorrow morning.

11 And, Mr. DeVan, they'll report up here?

12 DEPUTY CLERK: No, to the jury.

13 THE COURT: You'll report to jury, and please
14 be down in jury at 8:30.

16:56:00 15 So the jury is excused for the day.

16 DEPUTY CLERK: All rise.

17 - - -

18 (Jury excused for the day at 4:56 p.m.)

19 - - -

16:56:44 20 THE COURT: What do we have for tomorrow?

21 MR. GILBERT: We have Koehler, Nicholson,
22 Zehner, Compton, Couch-Page, maybe Momchilov.

23 MS. GREENE: Depending on how things go, we
24 may continue on to Sara Knowlton and Matt Garber.

16:57:11 25 THE COURT: All right. So you have a full day

1 tomorrow with your witnesses, correct?

2 MR. GILBERT: Yes.

3 MS. GREENE: Yes.

4 THE COURT: All right. Very well.

16:57:18 5 Ms. Kassel, do you want to give us the time remaining.

6 MS. KASSEL: Plaintiffs are at 7 hours, 50
7 minutes, and 35 seconds.

8 Defendants have used none of their time.

9 THE COURT: And do we have any other matters
16:57:31 10 to discuss before tomorrow?

11 MR. DOWNEY: Not from defendants.

12 MR. GILBERT: No.

13 THE COURT: Anything for the plaintiffs?

14 MR. GILBERT: I'm just trying to figure out
16:57:41 15 what --

16 You said how many hours? Seven hours?

17 MS. KASSEL: You have seven hours.

18 MR. GILBERT: Does that include --

19 THE COURT: Used.

20 MR. GILBERT: -- include opening?

21 THE COURT: No, it does not.

22 MS. KASSEL: No, it does not. Out of your 10
23 hours, you have 7 hours, 50 minutes 35 seconds.

24 MR. GILBERT: Remaining.

16:57:55 25 MS. KASSEL: Remaining.

1 MR. GILBERT: Oh, okay.

2 MR. DOWNEY: It's only 5:00.

3 THE COURT: All right. Very well.

4 MR. DOWNEY: It felt like seven hours to us,
16:58:07 5 too.

6 THE COURT: Be in the courtroom tomorrow by
7 8:45.

8 MR. DOWNEY: Thank you, Your Honor.

9 MS. WILLIAMSON: Thank you.

10 THE COURT: And just a reminder that
11 Judge Greenberg is available, in the event that you want to
12 talk to him.

13 And if you would prefer that I, at some point, just
14 ask him to see you without either party requesting, I'll be
16:58:30 15 very happy to do that also.

16 All right. There being no further business before the
17 Court, we are in recess for the day.

18 MR. DOWNEY: Thank you.

19 MS. GREENE: Thank you.

20 MR. GILBERT: Thank you.

21 THE COURT: Thank you.

22 And you may make arrangements with Mr. DeVan, if you
23 want to leave things in the courtroom and have them locked
24 up.

25 MS. WILLIAMSON: Thank you.

1 THE COURT: I know I've said this in other
2 trials. I want to say it again.

3 I want to thank counsel for their cooperation, and for
4 having this move along.

16:59:50 5 I've tried cases for 25 years, and I know when I go
6 home, except to look over my notes and make a few notes for
7 tomorrow, I'm essentially through until tomorrow morning,
8 but I know your work has just begun for the next day.

9 And I very much appreciate the work that you do,
17:00:05 10 especially when it manifests itself in a trial. It's moving
11 along, from my perspective.

12 MR. GILBERT: I've never been in a trial where
13 I've gotten this much testimony in the first day.

14 THE COURT: All right. Well, that's good, I
17:00:21 15 guess.

16 MR. GILBERT: Even in Muni Court, you know.

17 THE COURT: All right. Well, very good.

18 Let's hope that all this continues, and that we're off to a
19 good start that we'll follow through with this trial.

17:00:51 20 — — —

21 (Proceedings in recess for the day at 4:58 p.m.)

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C E R T I F I C A T E

I certify that the foregoing is a correct transcript
from the record of proceedings in the above-entitled matter.

/s/ Donnalee Cotone 21st of April, 2019
DONNALEE COTONE, RMR, CRR, CRC DATE
Realtime Systems Administrator